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N. 3007

No. 15111

United States
Court of Appeals
for the Ninth Circuit

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a Partnership Composed of Dick
E. Stearns and Ellen Belson Stearns,

Appellants,

vs.

TINKER & RASOR, a Corporation, JOHN P.
RASOR and LEO H. TINKER,

Appellees.

TINKER & RASOR, a Corporation, JOHN P.
RASOR and LEO H. TINKER,

Appellants,

vs.

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a Partnership Composed of Dick
E. Stearns and Ellen Belson Stearns,

Appellees.

Transcript of Record

Appeals from the United States District Court for the
Southern District of California,
Central Division.

No. 15111

**United States
Court of Appeals**
for the Ninth Circuit

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a Partnership Composed of Dick
E. Stearns and Ellen Belson Stearns,
Appellants,
vs.

TINKER & RASOR, a Corporation, JOHN P.
RASOR and LEO H. TINKER,
Appellees.

TINKER & RASOR, a Corporation, JOHN P.
RASOR and LEO H. TINKER,
Appellants,
vs.

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a Partnership Composed of Dick
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Court of Appeals
for the Ninth Circuit

No. 13,634

DICK E. STEARNS, Etc.,

vs.

TINKER & RASOR, et al.

(In the United States District Court, Southern District of California, Central Division.
No. 12,032-HW.)

MANDATE

United States of America—ss.

The President of the United States of America

To the Honorable the Judges of the United States
District Court for the Southern District of
California, Central Division, Greeting:

Whereas, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in a cause between Dick E. Stearns and the D. E. Stearns Company, a partnership composed of Dick E. Stearns and Ellen Belson Stearns, Plaintiffs, and Tinker & Razor, a corporation, John Patrick Razor and Leo H. Tinker, Defendants, No. 12032, a Judgment was entered on the 23rd day of September, 1952; which said Judgment is of record and fully set out in the office of the clerk of the said District Court in said cause, to which record reference is

hereby made and the same is hereby expressly made a part hereof.

And Whereas, the said plaintiffs appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 12th day of August, in the year of our Lord, one thousand nine hundred and fifty-four, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court, with costs in favor of the Appellants, and against the Appellees. [17*]

It Is Further Ordered and adjudged by this Court, that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

(February 7, 1955.)

*Page numbering appearing at foot of page of original Certified Transcript of Record.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the thirty-first day of March, in the year of our Lord one thousand nine hundred and fifty-five.

/s/ PAUL P. O'BRIEN,

Clerk, United States Court of Appeals for the Ninth Circuit.

Costs

Clerk of District Court.....	\$ 2.00
Printing Record	2,056.81
Docket Fee, Court of Appeals.....	25.00
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Total.....	\$2,083.81

[Endorsed]: Filed April 11, 1955.

Judgment docketed and entered April 12, 1955.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 12,032-HW.

DICK E. STEARNS and the D. E. STEARNS
COMPANY, a Partnership Composed of Dick
E. Stearns and Ellen Belson Stearns,

Plaintiffs,

vs.

TINKER & RASOR, a Corporation; LEO H.
TINKER and JOHN PATRICK RASOR,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled Action having been tried before this Court on April 1, 2, 3, 4 and 8, 1952, and this Court having previously rendered its decision and judgment and having made findings of fact and conclusions of law, and such judgment having been reversed by the United States Court of Appeals for the Ninth Circuit and remanded to this Court for further proceedings not inconsistent with the opinion of said Court of Appeals reported at 220 F. 2nd 49; and this Court having had such further proceedings and heard and considered further arguments of Counsel for the parties on November 10, 1955, and having considered proposed findings of fact and conclusions of law submitted by all of the parties, this Court now makes the following find-

ings of fact and conclusions of law pursuant [18] to Rule 52 of the Federal Rules of Civil Procedure:

Findings of Fact

General and Formal Findings

Finding No. 1. The plaintiff Dick E. Stearns, an individual, is a resident of Shreveport, Louisiana, and the plaintiff D. E. Stearns Company is a partnership composed of the said Dick E. Stearns and Ellen Belson Stearns and having its principal place of business in Shreveport, Louisiana.

Finding No. 2. The defendant Tinker & Rasor is a corporation organized and existing under the laws of the State of California and has its principal office and place of business in San Gabriel, California, within the Southern District of California, Central Division.

Finding No. 3. The defendants John Patrick Rasor and Leo H. Tinker, both individuals, are residents of San Gabriel, California, within the Southern District of California, Central Division.

Finding No. 4. This action was instituted by the plaintiff Dick E. Stearns against the defendant Tinker & Rasor for alleged infringement of United States Letters Patent No. 2,332,182, granted October 19, 1943, on an application filed August 23, 1941, entitled "Insulation Testing Device," hereinafter referred to as "the Stearns Patent," such action being brought under the patent laws of the United

States and seeking an injunction, an accounting of profits and an award of damages.

Finding No. 5. Subsequently, by a first amended complaint, [19] the D. E. Stearns Company was joined as a party plaintiff and by a second amended complaint, the individuals John Patrick Rasor and Leo H. Tinker were joined as parties defendant.

Finding No. 6. Claims 1 and 7 of said Stearns Patent are alleged to be infringed, but plaintiffs now rely primarily upon Claim 1.

Finding No. 7. The plaintiff D. E. Stearns Company became owner of the Stearns Patent by assignment dated January 20, 1951, and has ever since been and now is the owner of said patent.

Finding No. 8. The Stearns Patent relates to apparatus known as a holiday detector employed for electrical inspection of protective coatings on pipelines to locate flaws in such coatings, such flaws being known in the art as "holidays."

Finding No. 9. Defendants have answered, alleging as defenses the following:

(a) That Claims 1 and 7 are invalid for want of invention.

(b) Noninfringement.

(c) That Claims 1 and 7 are invalid because they do not particularly point out and distinctly claim the invention.

(d) Misuse of the patent by employing it to exercise a monopoly over and to restrain competition in unpatented materials.

Finding No. 10. On September 23, 1952, this Court made [20] findings of fact and conclusions of law and entered its judgment sustaining the defense of invalidity for want of invention (referred to in Finding No. 9(a) above) and expressly reserving findings with respect to the three other defenses (referred to in Findings Nos. 9(b), (c) and (d) above), but on appeal to the Court of Appeals for the Ninth Circuit, No. 13,634, this Court's judgment was reversed and the cause was remanded for further proceedings not inconsistent with the opinion of the Court of Appeals, which is reported at 220 F. 2d 49.

Finding No. 11. The Court of Appeals in its opinion reversed this Court solely on the issue of lack of invention and left for determination by this Court all other issues and defenses, including those set forth in Findings Nos. 9(b), 9(c) and 9(d) above.

Finding No. 12. There is invention in the device of the Stearns Patent.

Finding No. 13. Plaintiffs allege that the following holiday detectors infringe Claims 1 and 7:

(a) The Model C-3 Detector manufactured and sold by the corporate defendant Tinker & Rasor, which is exemplified by Plaintiffs, Exhs. 26A, 26B and 26C.

(b) Four holiday detectors manufactured by the individual defendants Leo H. Tinker and John P. Rasor prior to incorporation of the corporate defendant Tinker & Rasor; one such detector being identified as the "Model A" and three as the "Model B."

Finding No. 14. Defendants admit that the [21] Model A detector infringed Claim 7 if that claim is valid, and that the Model B detectors infringed Claims 1 and 7 if that claim is valid, and that one Model A and three Model B detectors were manufactured and sold by the individual defendants Leo H. Tinker and John P. Rasor prior to incorporation of the corporate defendant Tinker & Rasor.

Finding No. 15. Defendants admit that the Model C-3 Detector (Plaintiff's Exhs. 26A, 26B and 26C) referred to in Finding No. 13(a) was manufactured and sold by the corporate defendant Tinker & Rasor, but deny that it is an infringement of either Claim 1 or Claim 7.

Findings Regarding Claim 1

Finding No. 16. Plaintiffs rely primarily upon Claim 1 of the Stearns Patent to establish the charge of infringement.

Finding No. 17. Claim 1 is for two elements, each of which is admitted by plaintiffs to be old and which are as follows:

(a) "an exploring electrode in the form of a coiled spring adapted to extend about such member

[a pipe] and having its ends secured together to completely embrace such member [the pipe].”

(b) “means rotatably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member [the pipe] for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member [the pipe].” [22]

Finding No. 18. The second element of Claim 1 is the pusher element which rotatably engages the electrode (the first element) as well as forming a movable electrical contact with the electrode.

Finding No. 19. There is a dispute between the parties as to the interpretation of Claim 1. This dispute is focused on the meaning of the phrase “rotatably engaging” which defines the type of engagement of the pusher with the electrode. Defendants contend that this phrase means that the pusher has a revolving or rotating part such as a wheel or roller. Plaintiffs contend this phrase means a bearing or engagement where one part, or both, either way, would be free to rotate and that it does not mean that the pusher has a rotating part such as a wheel or roller. The dispute between the parties includes conflicting testimony of witnesses at the trial, such conflicting testimony being typified by the following:

(a) Plaintiffs’ expert witness, Lee, testified at page 295, line 22, to page 296, line 27, of the Reporter’s Transcript of Proceedings at the trial, that

in his opinion the meaning of “rotatably engaging” is as follows:

“Well, rotatably engaging means you must have some kind of bearing or engagement where one part, or both, either way, would be free to rotate.”

(b) Defendants’ expert witness, Peterson, testified at page 539, line 20, to page 543, line 13, of the Reporter’s Transcript of Proceedings at the trial that, from a reading of the specification and claims of the Stearns Patent and from a study of the drawings, that “It seems quite clear” [23] Mr. Stearns did not contemplate the use of anything else as a pusher and contactor for his electrode, other than something which rotates.

Finding No. 20. It is necessary to ascertain the precise meaning of the language “rotatably engaging,” for the following reasons:

(a) Defendant Tinker & Razor’s device, exemplified by Plaintiffs’ Exhs. 26A, 26B and 26C, uses a pusher element (Exh. 26A) which, unlike the pusher element of plaintiffs’ device, exemplified by Plaintiffs’ Exh. 17, does not employ wheels or rollers to engage the electrode.

(b) The point of conflict and dispute is whether the language “rotatably engaging” in Claim 1 limits that claim to a pusher with wheels or rollers engaging the electrode.

Finding No. 21. Claim 1 of the Stearns Patent was Claim 3 of the Stearns application for patent

and, as originally presented to the Patent Office, defined the pusher as “means forming a movable electrical contact with said spring”; but the Patent Office rejected Claim 3 for the following reasons: “Claims 1-4 are rejected as indefinite and incomplete” and “Claim 3” is rejected as unpatentable over Clarvoe in view of Dye and Bensett or Lenz.” Claim 3 was then amended by Stearns to add that the pusher not only forms a “movable electrical contact” with the electrode but also rotatably engages the electrode.

Finding No. 22. Stearns was required by the Patent Office to amend Claim 3 of the application to include rotatable engagement as well as movable contact between the pusher and the [24] electrode, as a prerequisite for allowance of the claim, which became Claim 1 of the Stearns Patent.

Finding No. 23. If Stearns had not complied with this requirement of the Patent Office that the contact of the pusher with the electrode be defined as a rotatable engagement as well as a movable contact, the claim would not have been allowed by the Patent Office.

Finding No. 24. The drawings of the Stearns Patent show only two forms of pusher, as follows:

(a) That shown in Figure 10 in which wheels 44 and 45 are in contact with the electrode and wheels 46 and 47 are in contact with the pipe and with the wheels 44 and 45.

(b) That shown in Figure 15 in which wheels contacting the pipe are omitted and only wheels 68 and 69 in contact with the electrode are employed.

Finding No. 25. The specification at page 2, column 2, commencing at line 47, states with regard to the pusher of Figure 10: "It is intended that when the wheels 46 and 47 are employed they shall serve as friction wheels to provide frictional engagement with the surface of the pipe and with wheels 44 and 45 so that when the device is moved along the pipe, the wheels 44 and 45 will be made to rotate."

Finding No. 26. The specification at page 3, column 1, commencing at line 4, states with regard to the pusher of Figure 15 that friction wheels 46 and 47 may be omitted but that "Wheels 68 and 69 must rotate easily to cause proper propulsion of [25] the electrode while permitting it to rotate" [lines 24-27].

Finding No. 27. The language quoted above is the only language contained in the Stearns Patent which explains or clarifies the meaning of the phrase "rotatably engaging" in Claim 1, and it is clear from this language that the pusher means "rotatably engaging" the electrode must have wheels or rollers and the wheels or rollers must either be driven (as in Figure 10) or must rotate easily (as in Figure 15), otherwise proper operation of the electrode will not result.

Finding No. 28. This interpretation of Claim 1 is confirmed by the testimony of the inventor and

plaintiff Dick E. Stearns at the trial as set forth in the following Findings Nos. 29 to 32.

Finding No. 29. Dick E. Stearns testified that, prior to filing his application for patent, he experimented with a pusher without wheels or rollers, in the form of a block of wood with a U-shaped notch cut out to fit over a coiled spring, such pusher being illustrated by Defendants' Exh. B.

Finding No. 30. Dick E. Stearns testified that he considered this experimental pusher, Defendants' Exh. B, to be unsatisfactory because, in going from forward to backward motion, he believed it would break contact with the spring and such breaking of contact would cause a spark to occur and would give a false indication of a holiday.

Finding No. 31. Dick E. Stearns testified that, because of his dissatisfaction with this type of pusher, Defs.' Exh. B, he discarded it, never used it again, never reduced it to practice, [26] and never employed that type of pusher in a holiday detector.

Finding No. 32. Dick E. Stearns testified that the only holiday detectors ever experimented with or built by him relating to the subject matter of this suit embodied a coiled spring electrode, a carriage or platform on wheels and a pusher in the form of a rigid arm rigidly fixed to the carriage and having wheels in contact with the electrode.

Finding No. 33. Claim 1 is, therefore, limited in scope to a rolling coiled spring electrode-pusher

combination in which the pusher has wheels or rollers engaging the electrode.

Finding No. 34. The defendant Tinker & Razor's device, exemplified by Plaintiffs' Exhs. 26A, 26B and 26C, does not employ a pusher with wheels engaging the electrode.

Finding No. 35. Claim 1 is not entitled to embrace the defendant Tinker & Razor's pusher, Plaintiffs' Exh. 26A, as an equivalent because:

(a) Pushers without wheels or rollers are disclaimed on the face of the Stearns Patent.

(b) The Stearns Patent on its face contemplates no alternative to a wheeled pusher.

(c) By amending Claim 1 to recite a wheeled pusher Stearns disclaimed and abandoned all other structures except as set forth in Claim 1.

Finding No. 36. If the language "means rotatably [27] engaging" in Claim 1 is given a broader meaning so as to include pushers which have no wheels or rollers, then it has only an indefinite, functional meaning; it includes all manner of pushers heretofore and hereafter discovered by Stearns or anyone else that are capable of rolling the electrode; and it defines the pusher element in terms of what it will do (function) rather than in terms of what it is (structure).

Finding No. 37. If Claim 1 is construed broadly enough to include defendant Tinker & Razor's device, then it is functional and it fails to particu-

larly point out and distinctly claim the invention actually made by Dick E. Stearns.

Findings Regarding Claim 7

Finding No. 38. The three elements of Claim 7 are:

(a) “a carriage comprising a platform on wheels.”

(b) “an exploring electrode in the form of a flexible elongated member of circular cross-section and of an electrically conductive material adapted to embrace such member [a pipe] adjacent said carriage.”

(c) “an electrode pusher and contactor carried by and electrically insulated from said platform and having parts in electrical and mechanical contact with said electrode.”

Finding No. 39. The language of Claim 7 requires that these three elements be united mechanically so that “movement of said carriage longitudinally along a member to be tested [a pipe] will cause rolling movement of said electrode along such member [pipe].” [28]

Finding No. 40. Claim 7 requires that the pusher arm be a solid, rigid, immovable structure mechanically carried by and moving with the carriage so that movement of the carriage causes movement of the electrode.

Finding No. 41. The pusher (Exh. 26A) of defendant Tinker & Rasor's Model C-3 Detector is

not a solid, rigid, immovable structure mechanically carried by and moving with the carriage (Exh. 26B); and movement of the carriage does not and cannot result in movement of the electrode (Exh. 26C).

Finding No. 42. The structure of Claim 7 is not copied by defendant Tinker & Razor.

Finding No. 43. The pusher and carriage of defendant Tinker & Razor's Model C-3 Detector (Plaintiffs' Exhs. 26A, 26B and 26C) are not the equivalent of the pusher and carriage of Claim 7 because they do not do the same work in substantially the same way and do not accomplish the same result.

Finding No. 44. There is no disclosure or teaching in the Stearns Patent of any other than a rigid connection between the pusher and the carriage operating in mechanical unison to move the electrode.

Finding No. 45. If, therefore, Claim 7 is construed broadly enough to cover defendant Tinker & Razor's Model C-3 Detector (Plaintiffs' Exhs. 26A, 26B and 26C), then it fails to particularly point out and distinctly claim the invention made by Dick E. Stearns because it would cover something not disclosed or taught. [29]

Findings Regarding Misuse

Finding No. 46. The product of plaintiff D. E. Stearns Co. is the Stearns Electronic Holiday Detector.

Finding No. 47. The Stearns Electronic Holiday Detector consists of the following component parts:

(a) The electrode-pusher-carriage combination covered by the Stearns Patent, such combination being referred to hereinafter as the "Patented Apparatus."

(b) Electrical high voltage generating and signaling apparatus, referred to hereinafter as the "Electrical Apparatus."

Finding No. 48. The Electrical Apparatus is not covered by the Stearns Patent.

Finding No. 49. The Electrical Apparatus represents the major portion of the cost of a Stearns Electronic Holiday Detector.

Finding No. 50. The Patented Apparatus represents only a minor portion of the cost of a Stearns Electronic Holiday Detector not greatly in excess of ten per cent (10%) of the cost of the complete apparatus.

Finding No. 51. The D. E. Stearns Co. follows an exclusive exploitation policy as follows:

(a) It will lease but refuses to sell the Stearns Electronic Holiday Detector. [30]

(b) It refuses to sell or lease components of the Stearns Electronic Holiday Detector.

(c) It will not make the Patented Apparatus available except in conjunction with and tied to the Electrical Apparatus.

(d) It requires users to lease the apparatus as a whole.

Finding No. 52. The Stearns Patent establishes on its face that the Electrical Apparatus is a separable, divisible part of the Stearns Electronic Holiday Detector and that the Patented Apparatus need not be employed with the Electrical Apparatus of the D. E. Stearns Co. but may be used with electrical apparatus of other types.

Finding No. 53. If the Patented Apparatus of the D. E. Stearns Co. were made available with or without the Electrical Apparatus of the D. E. Stearns Co. in accordance with customers' preferences, it would be feasible to employ electrical apparatus of competitors with the Patented Apparatus of the D. E. Stearns Co., and vice versa.

Finding No. 54. The actual, realistic effect upon competition of the tie-in policy of the D. E. Stearns Co. is to require persons who desire to obtain the separable Patented Apparatus to take and pay for the unpatented Electrical Apparatus as well.

Finding No. 55. The actual, realistic effect of the tie-in policy of the D. E. Stearns Co. is to restrain trade and competition in unpatented materials, more particularly, in electrical [31] high voltage and signaling apparatus and components thereof for holiday detectors.

Finding No. 56. The defendant Tinker & Razor has been injured and damaged in its business by the tie-in policy of the D. E. Stearns Co. and has

been deprived of the opportunity to supply unpatented electrical components for use with the Patented Apparatus of the Stearns Electronic Holiday Detector.

Finding No. 57. Licenses granted by the D. E. Stearns Co. (Defs.' Exhs. AA and BB) require the licensee to pay a royalty of \$250.00 for each electrode-pusher combination, regardless of whether such combination is sold or leased alone or is tied to a complete detector including unpatented electrical apparatus.

Finding No. 58. John P. Rasor testified, and his testimony is uncontradicted, that the defendant Tinker & Rasor sells its electrode-pusher combinations for about \$22.50.

Finding No. 59. John P. Rasor further testified, and his testimony is uncontradicted, that a licensee could not sell such combinations, which are presently priced at about \$22.50, and pay a royalty of \$250.00 for each combination, without tying the sale of a combination to the sale or rental of a complete detector including unpatented electrical apparatus.

Finding No. 60. The inevitable effect of the licensing policy of the D. E. Stearns Co. is to require licensees to adopt and adhere to the same policy as the D. E. Stearns Co., namely, offering patented apparatus only in conjunction with and tied to unpatented electrical apparatus, thereby restraining competition in unpatented components of holiday detectors. [32]

Conclusions of Law

I. This Court has jurisdiction of the parties and of the subject matter.

II. The one Model A detector manufactured by the individual defendants Leo H. Tinker and John P. Rasor was an infringement of Claim 7 if that claim is valid, and the three Model B detectors manufactured by said individual defendants were an infringement of Claims 1 and 7, if those claims are valid.

III. Plaintiffs are not, however, entitled to relief for such infringement because they have misused the Stearns Patent by employing it to monopolize and to restrain competition in unpatented materials.

IV. None of the devices manufactured by the corporate defendant Tinker & Rasor, including the Model C-3 which is exemplified by Plaintiffs' Exhs. 26A, 26B and 26C, is an infringement of either Claim 1 or Claim 7.

V. Where a claim of a patent application has been rejected by the Patent Office and a phrase defining an element of construction is inserted by the applicant to overcome the rejection and secure the allowance of the claim, the insertion of such phrase constitutes an abandonment by the patentee of all other constructions.

VI. Where the meaning of a phrase of a patent claim defining an element of construction is in issue,

and where the teachings of the patent specification and the prior conduct of the inventor clearly show that he contemplated but one type of [33] construction and contemplated no alternative, then it is not permissible to construe such phrase to include an alternative construction.

VII. If Claims 1 and 7 of the Stearns Patent are construed to cover the device manufactured by the defendant Tinker & Rasor, exemplified by Plaintiffs' Exhibits 26A, 26B and 26C, then Claims 1 and 7 are invalid for failure to particularly point out and distinctly claim the invention.

VIII. Claims 1 and 7 of the Stearns Patent, construed as in the Findings of this Court, are valid.

IX. Defendants are entitled to an accounting for damages for the damage sustained by them by reason of Plaintiffs' unlawful use of the Stearns Patent to monopolize and to restrain competition in unpatented materials.

X. Plaintiffs' Second Amended Complaint should be dismissed with costs allowed to defendants.

/s/ HARRY C. WESTOVER,

United States District Judge.

Dated this 29th day of December, 1955.

Lodged December 23, 1955.

[Endorsed]: Filed December 29, 1955. [34]

[Title of District Court and Cause.]

ORDER RE PLAINTIFFS' MOTION TO
AMEND AND MODIFY FINAL JUDG-
MENT, FINDINGS OF FACT AND CON-
CLUSIONS OF LAW

"Plaintiffs' Motion to Amend and Modify Final Judgment, Findings of Fact and Conclusions of Law," having been considered by the Court, and arguments of attorneys for plaintiff and defendant relative thereto having been heard in open Court on January 23, 1956, it is now adjudged and ordered that:

I.

Paragraph II of the Judgment be deleted and the following substituted therefor:

"That the counterclaim for damages presented with the answer to the second amended complaint herein be and is hereby dismissed upon the [35] merits."

II.

That the Judgment be amended and modified by adding thereto Paragraph IV, as follows:

"That cost be awarded to the plaintiffs in the sum of for the first appeal as per the Court of Appeals mandate."

III.

That Paragraph III of the Judgment be amended to read:

"That cost in the lower Court be awarded the defendants in the sum of"

IV.

That Finding of Fact 56 be deleted.

V.

That Conclusion of Law IX be deleted.

Dated this 9th day of February, 1956.

/s/ HARRY C. WESTOVER,

Judge, United States District
Court.

Approved as to form:

/s/ EDWARD B. GREGG,

Attorney for Defendants.

[Endorsed]: Filed, docketed and entered February 9, 1956. [36]

In the United States District Court, Southern
District of California, Central Division
Civil Action No. 12,032—HW.

DICK E. STEARNS and the D. E. STEARNS
COMPANY, a Partnership Composed of Dick
E. Stearns and Ellen Belson Stearns,

Plaintiffs,

vs.

TINKER & RASOR, a Corporation; LEO H.
TINKER and JOHN PATRICK RASOR,
Defendants.

FINAL JUDGMENT

This action having been tried and briefed, and
further proceedings being had and considered by

this Court after remand from the Court of Appeals, and findings of fact and conclusions of law having been made consistently with the opinion of the Court of Appeals at 220 F. 2d 49,

It Is Ordered, Adjudged and Decreed as follows:

I.

That the Second Amended Complaint herein be, and is hereby, dismissed upon the merits. [37]

II.

That the counterclaim for damages presented with the answer to the Second Amended Complaint herein be and is hereby dismissed upon the merits.

III.

That costs in the lower Court be awarded the Defendants in the sum of \$478.77.

IV.

That costs be awarded to the Plaintiffs in the sum of \$2,083.81 for the first appeal as per the Court of Appeals mandate.

Dated this 9th day of February, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

Approved as to form, but Plaintiffs hereby except to Articles I and III of the Final Judgment and

the Findings of Fact and Conclusions of Law in support thereof.

/s/ R. CALVIN WHITE,
Attorney for Plaintiffs.

[Endorsed]: Filed, docketed and entered February 9, 1956. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Dick E. Stearns and the D. E. Stearns Company, a partnership composed of Dick E. Stearns and Ellen Belson Stearns, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 9, 1956.

H. CALVIN WHITE,
WILLIAM P. GREEN,

By /s/ H. CALVIN WHITE,
Attorneys for Appellants.

[Endorsed]: Filed March 8, 1956. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tinker & Rasor, a corporation; John P. Rasor and Leo H. Tinker,

defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the following portions of the final Judgment entered in this action on February 9, 1956, to wit:

Paragraph II dismissing defendants' counterclaim for damages.

Paragraph IV awarding plaintiffs costs on the first appeal.

/s/ EDWARD B. GREGG,
Attorney for Defendants.

Certificate of Service attached.

[Endorsed]: Filed March 9, 1956. [40]

[Title of District Court and Cause.]

ORDER STAYING EXECUTION OF COSTS
PENDING APPEAL

Pursuant to defendants' Petition, attached hereto, it is hereby ordered that the cash bond of \$2500.00 posted by defendants shall serve as a cash bond in the appeal currently being filed in subject action and that execution of costs awarded by the Court of Appeals shall be stayed pending said appeal.

/s/ HARRY C. WESTOVER,
Judge.

Dated: March 20, 1956.

[Endorsed]: Filed March 20, 1956. [51]

In the United States District Court, Southern
District of California, Central Division

No. 12032-HW Civil

DICK E. STEARNS, et al.,

Plaintiffs,

vs.

TINKER & RASOR, et al.,

Defendants.

Honorable Harry C. Westover, judge presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Thursday, November 10, 1955

Appearances:

For the Plaintiffs:

JAMES B. SIMMS, ESQ.

For the Defendants:

EDWARD B. GREGG, ESQ.;

H. B. HARDY, ESQ.

The Clerk: No. 12032-HW Civil, Stearns vs. Tinker & Rasor, a corporation, further proceedings.

Mr. Simms: May it please the court——

Mr. Gregg: Mr. Simms, before you proceed, I would like to introduce Mr. Hardy, if I may.

Mr. Sims: Certainly.

Mr. Gregg: I would like to introduce my asso-

ciate, Henry Hardy from San Francisco, who is a member in good standing of the bar of this court and would like to enter his appearance in this case for the defendants.

The Court: Such may be the order.

Mr. Simms: I understand, your Honor, we are here this morning for an argument. What is your Honor's wish as to time?

The Court: We are here for further proceedings. If your further proceedings are argument, then you can argue. If the further proceedings are something else, then——

Mr. Simms: May it please the court, I think the case having been fully tried as far as the plaintiff is concerned, argument is the only further proceeding required.

The Court: Well, as I look back over the case and read the decision, I predicted my opinion upon the theory that there was no invention. The Circuit says there was invention. So that issue is out of the way. So now I think we should proceed [2*] on the two questions remaining.

Assuming that there was invention, which we are going to have to assume, the next problem is whether or not the defendant's apparatus infringes upon the plaintiff's apparatus.

Mr. Simms: That's right.

The Court: And, if so, what the damage is. Now, that is the only problem left, isn't it?

Mr. Simms: I think so. I will put it this way.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

I had presumed, perhaps erroneously, that if your Honor found infringement did exist, then that the extent of the damages would be determined in an accounting probably before a master.

The Court: I don't know. I don't believe we did have any evidence at all as to damage, did we?

Mr. Simms: No, your Honor. There was no evidence as to damage and, at least frequently I thought it was the practice here to first determine the question of infringement and validity. Of course, if those should go against the patentee—

The Court: What do you mean by validity? Hasn't the Circuit Court established that?

Mr. Simms: I think the validity is established, your Honor. I think that part has been, but I don't think the question of infringement has been established yet.

The Court: Well, that's right. Suppose you proceed with the question of infringement then.

Mr. Gregg: Your Honor, I don't like to interrupt [3] counsel's argument, but I would like to present our view of the posture of this case at the present time. The issue of infringement has not been determined, but there are two other defenses which have not been determined. They were expressly reserved in finding No. 27 of this court, and that fact is noted in the opinion of the Court of Appeals.

There is the defense that the claims, claims 1 and 7 are invalid for failure to particularly point out and distinctly claim the invention.

There is the further defense of misuse of the patent.

So there are three issues, according to our understanding, which remain to be determined by this court.

In connection with our presentation, there is one further matter, which will take very little time, that we wish to call to the attention of this court at the present time, which is some letters that the plaintiffs have been circulating among our customers threatening them and, we believe, misrepresenting the opinion of the Court of Appeals. So those are the four topics that I would like to discuss. Infringement——

The Court: Well, am I going to consider anything that happened after the trial of this case?

Mr. Gregg: Well, your Honor, if you wish to——

The Court: I am not going to take any other testimony, am I? [4]

Mr. Gregg: No, It doesn't require any testimony. It is simply offering in evidence some letters which have been circulated by the plaintiff and if Mr. Sims will stipulate they are true and accurate copies of letters sent by him, no testimony will have to be taken. They speak for themselves in the light of the opinion of the Court of Appeals.

Mr. Simms: I think, your Honor, there is no status of the case at this time for introducing any testimony, documentary or otherwise; that the question to be determined is as the matter appeared at the filing of the complaint.

Mr. Gregg: I would suggest, your Honor, that you at least hear a few words on this supplemental matter and decide at this time whether you want to hear it further in this case or in a supplemental proceeding. It doesn't make a great deal of difference to us.

The Court: Suppose you proceed, then, upon your other two theories of defense, if you have got two other theories of defense.

Mr. Gregg: At this time, your Honor?

The Court: Yes. As I read the opinion, the opinion held that this was an invention.

Mr. Gregg: Your Honor, I am not touching upon the question of infringement just yet. I am touching upon, as I understand it, your wish to hear me now in connection with the other defenses. I would like to direct your attention to finding [5] No. 27 of this court.

The Court: May I have the file, please?

The Clerk: Your Honor, I am not able to find those since they went up on appeal.

The Court: Haven't they come back from the Circuit?

Mr. Gregg: I am reading from the printed copy of the transcript of record. Does the court have available the printed transcript of the record? That is the only place I have it.

The Court: If the clerk has it, I haven't seen it yet.

Mr. Gregg: Do you gentlemen have an extra copy of the printed transcript?

Mr. Simms: No.

Mr. Gregg: Your Honor, I will hand this up to the bench to you.

The Court: Let's see your copy.

Mr. Gregg: This is 27 that I have checked in the margin.

The Court: All right.

Mr. Gregg: Your Honor, I believe that the record clearly establishes that there was the additional defense directed to the validity, namely, that the claims do not particularly point out and distinctly claim the invention as required by statute. I would like to direct your attention to how that matter was handled by the Court of Appeals in its opinion. Do you have a printed copy of the opinion? [6]

The Court: It is published, and I have it here.

Mr. Gregg: The Court of Appeals—I don't have the report, but I am quoting from the opinion as follows: In the first paragraph of the opinion, dropping down about the middle of the paragraph, the sentence beginning "Appellees"—that is the defendants in this case.

The Court: All right.

Mr. Gregg: "Appellees, by answer, raised the defenses that: The claims in suit were invalid for want of invention and because they do not particularly point out and distinctly claim the invention; the claims in suit were not infringed by appellees; and appellants were barred or estopped from obtaining any relief because of their misuse of the Stearns patent by employing it to exercise a monopoly over unpatented material."

Now, in the following paragraph, your Honor,

I am quoting again from the opinion of the Court of Appeals, and this is down about the middle of the paragraph, the sentence beginning, "No findings or conclusions"——

Do you find that, your Honor?

The Court: Yes.

Mr. Gregg: "No findings or conclusions were made upon the issues of invalidity of the claims because of failure to particularly point out and distinctly claim the invention * * *"

Then, your Honor, turning to the next to the [7] last paragraph of the opinion, the one just before the mandate and just above the citation of cases, and I am reading, quoting from the opinion, the sentence beginning, "When these indicia of invention"——

Have you found that, your Honor?

The Court: Yes.

Mr. Gregg: "When these indicia of invention are taken into account together with the true state of the prior art and what Stearns actually did to improve the art, it must be concluded that the Stearns patent is not invalid for want of invention."

The very phraseology used in the opening paragraph, the very phraseology used in the findings of the court with regard to the matter of invention, very clearly leave for determination by this court whether or not the claims comply with the statute and particularly point out and distinctly describe the invention.

So our contention is that that is an issue yet to be decided in this case.

Also to be decided is the issue of misuse, the issue of infringement, and we would like to bring to the attention of this court, if you will permit us at this time, otherwise in a separate proceeding, the fact that the plaintiffs have been circulating letters recently, October 25 is the date of those letters—I have them here with me in court. [8]

The Court: Supposing I would find after the commencement of this action that the plaintiffs had misused their patent. Could I use that misuse to declare the patent invalid?

Mr. Gregg: Your Honor, the particular point here with regard to the letters that the plaintiffs are circulating among our customers relates to the question of unfair competition. I have a number of cases in this Circuit——

The Court: Was there a cause of action on unfair competition?

Mr. Gregg: There was a cause of action stated for unfair competition.

The Court: Doesn't that unfair competition have to exist at the time the complaint was filed?

Mr. Gregg: This is a matter of unclean hands, your Honor. The plaintiffs are coming in here seeking the aid of a court of equity, and we contend on the facts and under the law their conduct——

The Court: I don't think I can consider anything that has happened after the trial to predicate a judgment that the patent has been unfairly used after the time of the trial.

Mr. Gregg: I think, your Honor, the matter of unclean hands can be raised at any time prior to the court having granted the relief that the plaintiff seeks.

The Court: Where is your authority?

Mr. Gregg: My authorities are the Dicalite case and the [9] Celite case, and also the cases set forth in our brief in this court on the question of misuse. It ultimately boils down to a matter of unclean hands.

The Court: Now, just a minute. I want to ask opposing counsel. Do you feel, assuming the court would find misuse after the trial of the case, that that misuse can be used to declare the patent invalid?

Mr. Simms: I don't think that misuse has ever been used at any time to declare a patent invalid. Misuse has been used to prevent the granting of relief sought as long as unclean hands existed, but I have never known of it happening—it may have, but I don't know of it happening after the initiation of a suit. In other words, my theory of trying a lawsuit is that you try it on the issues developed at the time of the filing of the complaint.

The Court: Well, that is my theory, unless there is a supplemental complaint filed which would bring it up to the time of trial. Here we have a trial, the case went up on appeal, and the misuse now which you want to set up happened after the decision of the Court of Appeals. We haven't got a new trial here. I am not going to grant a new trial. The Circuit didn't ask for a new trial.

Mr. Gregg: We are not asking for relief after judgment, because there has been no judgment. The only judgment that would do the plaintiffs any good in this case is a judgment [10] that there is infringement and an injunction enjoining the infringement. There has been no such action on the part of this court. We are here today to argue whether or not such a judgment should be rendered.

I have a case, *Hall vs. Wright*, 125 Fed. Supp., page 269, decided in September, 1954, by Judge Mathes of this court, relying upon a Circuit Court case, *Celite Corporation vs. Dicalite Company*, which is reported at 96 F. (2d), page 242, certiorari denied 304 U. S., page 363.

In the *Hall* case decided by Judge Mathes, I am quoting from the case at page 273:

“In brief it appears that suits filed in this and other courts were tried primarily to the trade. While pretending to look to this court of equity for justice, each side set about through myriad methods of self help to make their own justice.”

In other words, after suit was filed, which is the status and posture of this case here, and before there had been a final determination of the issues in favor of either party, which is exactly the situation here, Judge Mathes, relying upon the *Celite* case, held that the action of both parties in that case in going out and threatening and sending letters misrepresenting the situation to the trade constituted unclean hands and was the basis for denial of relief.

If your Honor prefers, this is a new matter, we

have [11] not been able to bring it to the attention of the court earlier because it has only come to our attention within the last week or ten days, I am perfectly willing that this matter be set down as a separate proceeding.

The Court: No. I have given you this day. We are going to dispose of the matter today. We are not going to continue the matter to any other time.

Mr. Gregg: I think I can dispose of it today.

The Court: Let's just pass over that phase of the case now. You have got an issue here that was raised in the pleadings.

You point out to me, if you can, what is in the record that shows that the claims did not particularly point out and distinctly claim the invention.

Mr. Gregg: Your Honor, I will first have to make a few brief remarks about the matter of infringement. The two devices are here. This is the plaintiff's device, Plaintiff's Exhibit 17, and this is the defendant's device, Plaintiff's Exhibits 26-A, -B and -C, lettered for the different parts.

Now, claim 1, your Honor, clearly calls for "means rotatably engaging the spring," and in connection with the issue of infringement, and I assume you are going to give Mr. Simms his opportunity to present that fully first, but I would like to briefly remark on that in this way. We contend that in the light of the history of the Stearns invention and in [12] the light of what the patent says upon its face, means rotatably engaging the coil spring electrode means wheels and rollers and nothing else, whereas we use no wheels or rollers

whatsoever. We use the wand here with the shoe on it.

In connection with claim 7, your Honor, I don't know whether Mr. Simms intends to rely on that any further or not. In connection with claim 7, that claim calls for the carriage or platform on wheels, the electrode and means connecting the carriage or platform mechanically and electrically with the electrodes, such that when the carriage is moved longitudinally along the pipe, it will cause a rolling motion of the electrode, which clearly is impossible in this situation. No matter what you do with this, this doesn't move, and no matter what you do with this, this doesn't move. The sole object of riding this instrument on the pipe is to take the load off the man's shoulder.

Now, your Honor, if claims 1 and 7 are given that interpretation, we have no interest in attacking the validity on the ground that they do not particularly point out and distinctly claim invention, but if the defendants wish to ignore the limitations in those claims, then most certainly we assert our defense that the claims are broader than the invention, that they do not particularly point out and distinctly claim invention.

The statute in force at present, your Honor is 35 [13] U. S. Code, Section 112, and I quote from that:

“The specification shall conclude with one or more claims particularly claiming the subject matter which the applicant regards as his invention.”

The previous statute, Revised Statute 4880, which is the old Title 35, Section 33, the language there was that the claim should particularly point out and distinctly claim invention.

Now, if the claims are construed to mean rollers or wheels on the pusher in connection with claim 1 and nothing more, and if claim 7 is construed to mean that there is a rigid connection and must be one between the carriage and electrode, such that we get this function, then the claims do comply with the statute as far as we are concerned, and we have no interest in contesting their validity, but we most certainly believe, and we have covered this very thoroughly in our brief, that the claims depart from the scope of the invention and do not comply with the statute.

The Court: Just a minute. Let me interrupt.

Mr. Gregg: All right.

The Court: I want to ask opposing counsel, what is the invention here? I held there was no invention because you had gathered together a large number of matters that were in the public domain and had created this apparatus, and I held there wasn't invention. Now, the Circuit says there is [14] invention. What is the invention? Is the invention the electrode or is the invention the carriage?

Mr. Simms: I think, your Honor, that the Court of Appeals has answered that.

The Court: All right. Where is it?

Mr. Simms: We are both bound by what they say.

The Court: Yes, I am bound. Where is it in the opinion?

Mr. Simms: You have the official report, do you?

The Court: I have the official report. If you will tell me about where it is——

Mr. Simms: I think I can tell you in just a moment.

Mr. Gregg: I have some extra copies of this opinion if the judge finds it more convenient to use this.

The Court: No. I have got this one marked up.

Mr. Simms: This is the part I want to read. It appears on—I imagine it would be about the third from the last page there. The paragraph starts out, “Without the support of the subsidiary findings.” Do you find that, your Honor?

The Court: Yes, I have got it.

Mr. Simms: Then if you go on down about four or five lines in the middle of the page, it reads:

“The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings.”

The Court: All right. [15]

Mr. Simms: “As we have determined, the spring electrode for the first time in its use in holiday detectors is rolled instead of being dragged. In the Stearns detector, the pusher rotably engages and forms a movable electric contact with the spring electrode so as to roll it and connect it electrically to the high voltage test circuit”;

Now, your Honor, we think that claim 1 is directed, and it is in accordance with the statement of the Court of Appeals, to the electrode in the form of a coil spring and adapted to have its ends connected about the pipe. Now, this is the electrode and it is adapted to have its ends placed about the pipe. Then the claim calls for means rotably engaging the electrode, and the means in this instance is the pusher.

And forming a movable electrical contact with the electrode, and that movable electrical contact with the electrode is the engagement of the bearing with the spring.

For rolling the spring along the pipe and for connecting it to the high voltage test circuit. This, of course, is the connection to the test circuit.

Now, certain of the claims are limited to carriages. Those claims would not be infringed by the devices——

The Court: Before we get to the carriage, I want to ask opposing counsel a question.

Mr. Sims: Fine. It is my thought claim 1 is not limited [16] to how the high voltage circuit is carried, whether it is in a shoulder strap or whether it is mounted on a pipe. The important thing, and that is the thing that the Court of Appeals found to constitute invention, was that we roll the spring. By this means it rotably engages, that being the words of the court, and forms an electrical contact.

The Court: I want to ask opposing counsel a question. Isn't it true now, assuming the carriages are exactly the same, assuming that the electrodes

are exactly the same, isn't it true that the only difference here is on the plaintiff's apparatus the electrode is connected to a bar that is permanent to the carriage, and on the defendant's apparatus, instead of having a connecting bar, you have a wand that can be used by the hand? It is connected with a wire? Isn't that the only difference between the two apparatuses fundamentally?

Mr. Gregg: Your Honor, I can see it is a difference, but I don't like the adverb "only."

The Court: Don't like what?

Mr. Gregg: I don't like to describe it as only the difference. It is an important difference.

The Court: What is the difference? In one you have got bar attached to the carriage. On the other, you have got a bar that is attached to the carriage with a wire. That is the only difference.

Mr. Gregg: Well, your Honor, I am afraid I would be [17] imposing upon Mr. Simms' argument with respect to infringement, but I think I can answer that for you very convincingly by going into the history of Mr. Stearns' invention, what he regarded his invention, according to his testimony.

The Court: No.

Mr. Gregg: And according to what the patent says on its face.

The Court: No. I am asking you a question here, a very simple question. The Circuit says there is an invention. The Circuit says there is an invention and there is the apparatus there that the Circuit says is an invention.

The Court: Now, on the other hand, we have

Mr. Gregg: Well, your Honor——
here a carriage practically the same thing. We have an electrode which is practically the same thing. The only difference here is the way it is connected to the carriage.

Mr. Gregg: Well, your Honor, Mr. Simms stopped reading at a convenient point. If we go back——

The Court: All right.

Mr. Gregg: To go back to the portion of the text of the Court of Appeals opinion, let's read all of it.

The Court: All right.

Mr. Gregg: "In the Stearns detector"—are you with me, your Honor?

The Court: You are not reading the same paragraph? [18]

Mr. Gregg: I am reading the same paragraph Mr. Simms read to you from the opinion, the paragraph beginning with "Without the support of the subsidiary findings."

The Court: I have got it. All right.

Mr. Gregg: Then down in that about halfway through, the sentence beginning, "In the Stearns detector"——

The Court: All right.

Mr. Gregg: "In the Stearns detector, the pusher rotatably engages and forms a movable electrical contact with the spring electrode so as to roll it and connect it electrically to the high voltage test circuit; and movement of the carriage longitudinally upon the pipe imparts a rolling movement to the spring electrode."

The Court: All right.

Mr. Gregg: But that doesn't happen here, your Honor.

The Court: The only difference here is that the rolling movement of the spring is caused in the Stearns apparatus by the moving of the carriage, and in the defendant's apparatus by the moving of the arm. Now, that is the only difference there is, absolutely all.

Mr. Gregg: Your Honor, we think the record shows conclusively and convincingly that Stearns regarded——

The Court: I don't care what the record shows. I have got the two apparatuses in front of me. They are exhibits. I can see what they do. [19]

Mr. Gregg: But, your Honor, we still have to go to the description in the patent. We still have to go to the testimony of the inventor himself as to what he regarded as his invention, and our defense here is based upon the language of the statute.

The Court: I am trying to find out the differences between the two things. That's all.

Mr. Gregg: You have stated the differences, your Honor.

The Court: I beg your pardon?

Mr. Gregg: You have stated the differences.

The Court: I suppose from looking at the two apparatuses that, at least the exhibit shows that probably the Stearns apparatus is—well, shall I say more streamlined, at least it is more enticing to the eye than the other apparatus, but as far as that is concerned, they both move up and down the pipe, and they both have four wheels.

Mr. Simms: May it please the court, there is one observation I think is important, and that is that the first machines made by the defendant didn't even have the difference your Honor pointed out. They were identical to this from the standpoint of manner of attachment. They employed the tongue secured to the carriage and were identical, and on advice of counsel, Mr. Rasor testified that they changed to this. I think it is important to note that they set out to take as exact a copy of what Stearns did as they could possibly do.

The Court: What do you say is the fundamental difference [20] between the two apparatuses?

Mr. Simms: I think that you named the fundamental difference, and I don't think it is a fundamental difference. It is just the desirability to integrate the machine where one hand will push it, or the hope that they might have some little difference to possibly avoid a patent infringement charge, and do the same thing in this fashion. I don't think there is a fundamental difference. I don't think there is a difference of any kind.

The Court: I am asking opposing counsel, then, what is the fundamental difference between them?

Mr. Gregg: The fundamental difference is an integrated instrument you can roll up and down the pipe in this manner, the whole thing together, and that integration, according to Mr. Stearns' testimony, was exceedingly important and it was the essence of his invention. In this case there is no integration whatsoever, whether this is rolled on a pipe or a man carries it. There is, as a matter of

fact, a pack strap version of this where a man carries it on his back. It makes no difference. This is not an integrated type of device.

For example, if there is a finding that my standing here operating the electrode and moving the carriage together, by doing that we get the same type operation that we get here, then of necessity it wouldn't follow where this is a pack strap instrument that I carry on my back, and I simply go [21] along here. The two simply can't be equated.

Mr. Simms: May I make one observation, your Honor? That is that claim 1, and counsel has always admitted it, has no recitation of the carriage at all in it. How that is carried, how the electrical high voltage test generating equipment is carried is just immaterial to claim 1. The important thing in the invention, as found by the Court of Appeals and stated in the patent and expressed in the claim, is the electrode and the means rotably engaging it to enable—rotably is the contractive word, rotate-able. That is exactly what we have.

As far as claim 1 is concerned, the carriage, whether it is here or not here, is entirely immaterial.

The only difference that there is—well, there is just no difference. One type of bearing as distinguished from the other bearing.

The Court: Well, the only difference I can see between the two detectors is the fact that there is a bar or a tongue upon the plaintiff's detector, which rotates the coil spring, and upon the defendant's detector, instead of having the bar attached to

the carriage, that is, attached permanently to the carriage, it is attached with a wire with a wand and the wand can be used by the operator. That's all the difference there is between the operation of the two.

Mr. Gregg: Well, your Honor, in connection with claim 1, there is another factor, and the claim does recite as an element, an element put in the claim during the course of the prosecution in order to overcome the objections of the examiner, that there must be means rotatably engaging the electrode, and I think the record convincingly shows what that means, and it excludes a construction of this sort. Now, that is in connection with claim 1.

The Court: Do you believe you could take the Stearns detector, saw off the bar or the tongue, and put a rod on it or a wand on it, avoid the patent?

Mr. Gregg: We do, your Honor.

The Court: That is your claim, then. The only thing you have here is the fact that the bearing is attached to the detector by a bar or by a tongue.

Mr. Gregg: The invention, as conceded by Stearns, was an integrated instrument. If you don't have an integration——

The Court: You know, I didn't think there was invention under the decision of the Supreme Court.

Mr. Gregg: Your Honor, we are still of that opinion.

The Court: The Circuit says I can't read. So there is invention. I don't know. I am going to have to take the Circuit's word that the Stearns patent is an invention. There is an invention here.

Mr. Gregg: The question is, what was the invention?

The Court: Well, it doesn't make any difference what the invention was if you have copied it. It seems to me that here [23] is fundamentally a copy.

Mr. Gregg: Your Honor, the invention has to be set forth in a claim, and the claim is invalid unless it states the invention. Our position is that——

The Court: Well, the Patent Office felt that the claims stated an invention. Of course, I am not bound by the findings of the Patent Office, but that is something at least the court could consider.

Mr. Gregg: Our problem is to determine what was the invention in those claims? In the case of claim 7, it is quite apparent from a reading of it what the invention was. It was an assembly of components whereby when the carriage is moved longitudinally along the pipe, it will cause a rolling motion of the electrode.

The Court: Do we have a copy of the patent?

Mr. Gregg: I have a copy of the patent. I intended to offer it up to you. This is somewhat marked up, but it is legible.

The Court: I had a law professor who said a law book without marks in it wasn't of any use. So I have always marked up law books and exhibits. Go ahead.

Mr. Simms: May it please the court, I would like to observe, I think counsel might best take the infringing structure first to distinguish claim 7 from the first infringing structure, and then show the distinction. Bear in mind that we are [24] pressing primarily claim 1 against this structure.

Mr. Gregg: Are you dropping claim 7 or are you urging it?

Mr. Simms: I think, your Honor, my statement is correct. We are pressing primarily claim 1. We leave claim 7 as to the structure up to your Honor. We think it is infringed. Your Honor may or may not.

Mr. Gregg: I think that is tantamount to a concession of the weakness of their case with regard to claim 7.

Mr. Simms: The thing I want to do is talk about the first model, because there can be no question whatsoever of any infringement of that. It is a copy of the patent. It is a copy of this device.

The Court: We don't have an exhibit of the first model, do we?

Mr. Simms: We don't have that, your Honor. We sought that information on an interrogatory. We asked them to give us a picture or drawing, something to show it. They gave us merely a word picture. In the trial that word picture was stipulated to be an accurate description and read by the witnesses on the patent drawings, and no question was ever made as to it.

Mr. Gregg: Your Honor, I think we could get those early activities out of the way very briefly. They occurred in 1948. They were actively carried out by the individual defendants, John Razor and Leo Tinker, before the corporate defendant [25] Tinker & Razor was formed. We concede as to two or three instruments manufactured by Mr. Razor and Mr. Tinker individually, that they were infringements of claim 7, if claim 7 is valid. We concede that.

But we would also like to point out they did it innocently. That does not relieve them from liability, but we would like to point out that they knew nothing about the Stearns patent. As a result of building those, they learned about the Stearns patent and they changed their construction on the advice of counsel to avoid infringement.

I don't see why Mr. Simms keeps dragging in this red herring of the early infringement. We concede the infringement if the claims are valid.

The Court: Well, let's look at claim 1. Claim 1 says——

Mr. Gregg: I have a breakdown of claim 1 and a breakdown of claim 7, if it will assist you.

The Court: Well, let me read claim 1.

“An electrical exploring device for detecting defects in an insulating coating on an elongated member which comprises——

Now, you don't find any objections so far, do you?

Mr. Gregg: No.

The Court: “* * * which comprises an exploring electrode in the form of a coiled spring.”

Do you find any objection so far?

Mr. Gregg: No, your Honor. [26]

The Court: “* * * adapted to extend about such member * * *”

No objection?

Mr. Gregg: No objection.

The Court: “* * * and having its ends secured together to completely embrace such member.”

Any objection?

Mr. Gregg: No objection.

The Court: “* * * and means rotatably engaging and forming a movable electrical contact with said spring * * *”

Any objection?

Mr. Gregg: Your Honor, at that point I do. We contend in the light of the history of what Stearns did before he filed his application and what he plainly states in his application, that the phrase “rotatably engaging” means one thing and only one thing, wheels or rollers on the pusher. If the plaintiffs are satisfied with that interpretation of the claim, we have no objection. If they insist——

The Court: You mean to say that you can’t infringe unless you have your connecting member using an apparatus that rotatably engages the spring, is that right?

Mr. Gregg: Your Honor, that is ambiguous right on its face. Being ambiguous, we have to go to the patent to determine what it means. We go to the description in the patent, and it plainly tells what it means. It means wheels or rollers. [27]

Our objection arises from the elastic way in which the plaintiffs seek to interpret that language, “means rotatably engaging.”

The Court: If that is your complaint as to claim 1——

Mr. Gregg: That is our position, your Honor.

The Court: That is your position on claim 1?

Mr. Gregg: I am prepared to go down through the record pointing out the Stearns testimony and the language in the patent to vindicate our position. It has been thoroughly briefed. I am prepared to argue it orally at this moment.

The Court: That is your complaint as to claim 1, is that correct?

Mr. Gregg: That is correct. We have no complaint as to claim 1 if that language is properly construed.

The Court: Now, is there any complaint as to claim 2?

Mr. Gregg: Claim 2 is not in issue. The only other claim is claim 7.

The Court: No. 3?

Mr. Gregg: No.

The Court: The only complaint is as to claim 7 otherwise.

Mr. Gregg: That is correct.

The Court: Let's read claim 7 then.

"In a device of the character described, a carriage comprising a platform on wheels." [28]

Any complaint so far?

Mr. Gregg: No objection there, your Honor.

The Court: "'* * * an exploring electrode in the form of a flexible elongated member of circular cross section * * *'"

Any complaint?

Mr. Gregg: No, your Honor.

The Court: "'* * * and of an electrically conductive material adapted to embrace such member adjacent said carriage.'"

Any complaint?

Mr. Gregg: No.

The Court: "'* * * and an electrode pusher and contactor carried by and electrically insulated from said platform * * *'"

Any complaint?

Mr. Gregg: None, your Honor.

The Court: “* * * and having parts in electrical and mechanical contact with said electrode whereby movement of said carriage longitudinally along a member to be tested will cause a rolling movement of said electrode along such member.”

Any complaint?

Mr. Gregg: We have no complaint. We have no objection. Again, as in the case of claim 1, if properly construed, we have no objection. If improperly construed, we certainly object.

The Court: Then you are coming down to argue the question [29] that the question here is the way the electrode comes in contact with the carriage?

Mr. Gregg: That is correct.

The Court: You say if it doesn't come in contact with wheels, then there is no infringement.

Mr. Gregg: Your Honor, in connection with the functional language at the end of claim 7, the elements are cited, the carriage comprising a platform on wheels, the exploring electrode, and the electrode pusher in contact, if that is to have any meaning at all, they must be combined in such manner that movement of said carriage longitudinally along a member to be tested will cause a rolling movement of said electrode along such member.

Our device does not do that.

The Court: Your device does everything that the plaintiff's device does except the actual contact of the pusher or the arm with the electrode?

Mr. Gregg: That is a very important difference, your Honor.

The Court: That is the only thing that is different here. On the plaintiff's electrode they have wheels come in contact with the electrode. On yours, you have a flat surface bearing.

Mr. Gregg: We think that is a very important difference, your Honor. The record amply shows the difference. [30]

The Court: Well, personally, I can't see very much difference. Of course, I am not in the business. If I were in the business, I might see a lot of difference. But I can't see very much difference.

Mr. Gregg: Your Honor, would you care at this time, or later after Mr. Simms has spoken, to hear me on the question of the testimony at the trial, the language of the patent, what the record has to say about these features which are differences? We all agree there are differences. The point of disagreement between the two parties is the importance of those differences.

The Court: Suppose we have apparatus that is perfected. It is made of 100 different things that are in the public domain. They are free to everybody. Somebody comes along and takes 100 different items that are free to everybody and combines them into an apparatus which they claim to be an invention.

Then supposing somebody comes along and uses 99 of those same things and changes just one, just makes one change? Instead of using a round object, maybe he uses a square object.

Let's assume in the first place the Circuit declares there is an invention. Now, the fact that you change the contour from a square to a round object, would that throw out the invention? [31]

Mr. Gregg: Your Honor, I think I can answer the question in this manner. To take your hypothetical case of 100 components, if the invention resides in the combination of those 100 components, and if one of them is omitted altogether, then clearly there is no infringement.

If, instead of one of the elements they omitted one is substituted for it, then we have to consult the doctrine of equivalents to find out whether the element substituted or the substituted element is the equivalent of the one whose place it took.

We contend there is no room for the doctrine of equivalents in this case.

The Court: Well, let's assume that they took 100 different elements, 100 different things that were free and open to the public and created something that the Circuit said, "Well, this is an invention. Although all the 100 different items were open to the public use, nevertheless they had been combined in such a way as to bring about a new result, and this is invention."

Another party comes along and uses 99 of them, but they substitute on one. Now, is there infringement?

Mr. Gregg: Your Honor, I am glad you used the phrase "new result." Let's direct our attention again to Claim 7. The plaintiffs admit each of the elements, the carriage, the platform on wheels, the

pusher contacting the spring, are old. [32] They have made that admission. They are bound by it. Now, it is quite clear under the A. & P. case, which hasn't been overruled, that the union of the elements must operate together to produce some new and unexpected result.

Now, what is that result? It is set forth in Claim 7.

“whereby movement”—this is the only thing that is alleged to be a new result——

“whereby movement of said carriage longitudinally along a member to be tested will cause a rolling movement”——

The Court: As I remember it, plaintiff was the first one to use that sort of a spring.

Mr. Gregg: He concedes the spring is old.

The Court: You introduced a switch spring, which I thought was similar, but the Circuit didn't agree. If I understand it right, the plaintiff is the only one who used this sort of a spring.

Mr. Gregg: The plaintiffs have admitted that the spring is old. They have also admitted Mudd used the spring. They operated the spring in a different way.

The Court: They admit the spring was old, but they didn't admit the use of the spring was old.

Mr. Gregg: It is their way of operating the spring that is new, your Honor.

The Court: That's right, the way of operating the spring. [33]

Mr. Gregg: We do not operate our spring that way.

The Court: What you have done here is the plaintiff has taken 50 or a hundred different items that were in the public domain and created their device. The defendants have come around and used the same thing. They have made one change. That is, instead of having the pusher attached permanently to the carriage and attached by means of wheels underneath the tongue, the defendants have used a rod which is connected with the pusher by a wire, and instead of using wheels, they have used a flat surface. They get exactly the same result, rotation of the spring pushed along the pipe.

Mr. Gregg: Your Honor, you seem to be impressed with the integrated structure of the defendant's device, which is relevant only to Claim 7. You have heard Mr. Simms say they don't attach very much importance to it.

The Court: I have to be impressed with it. The Circuit has impressed me with it. I wasn't impressed with it at the trial, but the Circuit changed my mind.

Well, I notice it's 11:00 o'clock. You know, the person that does the most work in a case like this is our reporter.

Mr. Gregg: That's right.

The Court: He is supposed to get everything that is said taken down. When several of us speak at the same time, it's a tough job. So I think we will give our reporter a few minutes' [34] rest. We will take our recess now until 15 minutes after 11:00.

(Recess.)

Mr. Gregg: If your Honor please, you were concerned with and raised some very searching and pertinent questions as to the substitution of one element for another, and I would like to go into that very briefly in connection with the record, but before doing that, your Honor, I would like to hand up to you a photostatic copy of a letter sent by Mr. Simms to one of our customers, the Pioneer Natural Gas Company, and I will mark on this letter the relevant statement.

Mr. Simms: May it please the Court, I do object to this because this is the letter we talked about earlier. All it is is a charge of infringement which the law imposes the duty upon us to do. It is something that transpired after the filing of the suit, after the trial of the suit, and after the Court of Appeals decision.

Mr. Gregg: Your Honor, it is relevant to the very question you raised about the significance of substituting one element for another. I would like at least an opportunity to explain why we think it is relevant.

Your Honor, the first paragraph of the letter to the Pioneer Natural Gas Company—I wonder if possibly we could have a copy marked for identification as the defendants' exhibit next in order so that the record will show what it is. [35]

The Court: It may be marked for identification only.

Mr. Gregg: Yes, for identification only, your Honor. I believe that will be Defendants' Exhibit LL. I think we got up to KK at the trial.

The Clerk: LL for identification.

(The document referred to was marked as Defendants' Exhibit LL for identification.)

Mr. Gregg: Speaking then, your Honor, of Defendants' Exhibit LL, the first paragraph reads as follows:

"It has come to the attention of our client, the D. E. Stearns Company, Shreveport, Louisiana, that your company is using holiday detector equipment which infringes Claim 1 of their United States patent 2,332,182."

Now, your Honor, that is the patent in issue here, and Claim 1 is one of the two claims in issue.

I presume that Mr. Simms, who signed this letter, or somebody acting for him, made an inspection of the instruments which the Pioneer Natural Gas Company was using. If they did, Mr. Rasor is ready, willing and able to take the stand and so prove, if he did, he would have found that the only instruments that the Pioneer Natural Gas Company had, which they had acquired from Tinker & Rasor, were one or two or three instruments of the type of Plaintiffs' Exhibit 26-A, -B and -C, together with one or two shoulder strap instruments in which the [36] wand and the coiled spring electrode are used, but the electrical apparatus is carried on the shoulder.

In other words, your Honor, I think we have made out a prima facie case that in charging infringement based upon inspection of the product sold by the defendants, that they have agreed Claim

7 was not infringed, because, for the reason I have been arguing, the integration of the instrument, movement of the platform or carriage on wheels causes rolling movement of the electrode. You can move this up and down as much as you please and it does not cause rolling movement of the electrode.

If Mr. Simms is taken by surprise, we are perfectly willing, with the Court's permission, to initiate supplementary proceedings in this action. We would love to.

Mr. Simms: May it please the Court, I object to trying a lawsuit against Pioneer Natural Gas Company in this suit vs. Tinker & Razor. Now, there must be an end to litigation some time. If we are going to instill all these issues involving detectors which are not in issue here and as to which there has been no evidence here—in this case we have put in evidence as to the alleged infringing device. We have got to draw the line some place.

The Court: May I ask counsel, what is the purpose of this letter? What are you trying to show?

Mr. Gregg: Are you asking me, your [37] Honor?

The Court: Yes, I am asking you.

Mr. Gregg: The purpose is to show this, that the plaintiff, knowing that the instrument which the Pioneer Natural Gas Company has purchased from the defendant Tinker & Razor is an instrument in which the electrode is moved by a wand type of pusher is not an infringement of Claim 7, because they have alleged infringement only with respect to Claim 1, has written this letter. There is an ad-

mission. Why is this? What inference can we draw, your Honor?

The Court: Is there an objection?

Mr. Simms: Your Honor, there is no admission whatsoever——

The Court: Is there an objection?

Mr. Simms: There is an objection, your Honor.

The Court: Sustained.

Mr. Gregg: Your Honor, I would like to offer Defendants' Exhibit LL in evidence.

Any objection, Mr. Simms?

The Court: Is there objection?

Mr. Simms: I object, your Honor.

The Court: Sustained.

Mr. Gregg: May I have the grounds for the objection, your Honor?

Mr. Simms: On the grounds previously stated. It is irrelevant to the issues of this case, particularly as to the purpose for which it was offered, for the purpose of determining [38] some sort of an admission that some other claim is not infringed, because it isn't mentioned.

The Court: As I read the Circuit's opinion, the Circuit did not order a new trial. "The judgment of the Court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

I haven't granted a new trial. The only thing that I think I will do is make new findings of fact and conclusions of law. I am not going to take any new evidence. I am going to make new findings of

fact and conclusions of law on the evidence already submitted.

Mr. Gregg: Your Honor, we submit that the judgment favorable to the plaintiffs in this action has got to be bottomed upon a finding of equivalents between the two structures.

The Court: Well, I will make the finding. You can argue there is no evidence to sustain the finding.

Mr. Gregg: We are being denied the opportunity to present evidence that the plaintiffs themselves admit there is no equivalence, speaking of Claim 7.

Did you wish to say something to the Court, Mr. Simms?

Mr. Simms: Not now.

Mr. Gregg: With your leave, your Honor, I would like to proceed now with a discussion of the record insofar as it throws light on Claim 1. [39]

The Court: Now, if you want to protect your record and make an offer of proof in regard to this exhibit, I will allow you to make an offer of proof.

Mr. Gregg: We will make an offer of proof, your Honor.

The Court: I may disagree with you, but I am certainly in agreement that you have a right to make your record.

Mr. Simms: Your Honor, I want to make one point there, that the defendant has rested its case.

The Court: I know.

Mr. Simms: Then that's all right.

The Court: If he wants to make this offer, I

will refuse to receive the letter in evidence. It may be important for him to make the offer. I think he should be allowed to put in the record his offer of proof, what he wants to establish by this letter and the reasons why. I don't know how you are damaged in any way or affected in any way.

Mr. Simms: I think the rule provides for that, but I did want to make the additional ground for objection, which has been sustained. As I understand it, the defendant has rested his case. That is the reason for making this statement.

The Court: Make your offer of proof.

Mr. Gregg: We make our offer of proof, your Honor.

Now, your Honor, in connection with Claim 1, upon which the plaintiffs' claim chiefly relied, Stearns' testimony at the trial was that he experimented with a block type [40] of pusher, and that was sketched and illustrated in what is now Defendants' Exhibit B. I have an extra copy of that, which I would like to hand up to the Court. You will note it is a simple block of wood with a U-shape cut in it intended to fit over a spring.

Now, Stearns' testimony in the record was that the sole object of his experimenting with Exhibit B, the block type pusher which had no roller or wheels connected with it, was to determine whether it would roll a spring. He further testified it was a faulty pusher. He further testified he discarded it, abandoned it, and never used it again.

Reading now from the transcript, pages 43-44—

this is the typewritten transcript in the trial court—I quote:

“Q. What did you do when you pushed on it”——

The context will show, your Honor, it refers to Exhibit B.

“Q. What did you do when you pushed on it for quite a while and it rolled the spring?

“A. I observed the action of the spring, the action of the connector, and looked underneath to see what was going on at the bottom of the pipe, looked at the sides and noted whether or not the spring followed along together and whether there was any slipping, any slipping motion, and I particularly noted that with the end of the pusher block down over the top of the spring, that each time you would reverse direction of [41] the spring, that is, going from forward to backward and motion, that there was a break in contact between the spring and one of the metal contacts on either side, whichever it might be, and then decided there would have to be some means of articulation furnished. If you are going to fasten a pusher onto a carriage frame and make it as an integrated holiday detector, that was important, because in changing the direction, the break was made between the electrode and the pusher contact, and that would cause a spark to occur and get a registration of the light and bell signal, which would be false.”

Now, reading from the transcript again at page 71, I quote:

“Q. Did you conduct electric current through

the spring, Mr. Stearns? That question was directed to the block type pusher, the pusher without the wheels or rollers as shown in Exhibit B.

“A. Not in this respect.

“Q. What was the object of that test?

“A. To determine whether or not the spring would roll.

“Q. Is that as far as you went with that type of pusher, Mr. Stearns, or did you continue with it further? A. Never used it again.”

Now, your Honor, it is clear that Stearns did not regard a block type pusher as suitable as a component of a holiday detector. It would not work and he discarded it. He [42] never used it again.

That is somewhat analogous to the Mudd situation dwelt upon at some length in the Court of Appeals decision, where Mudd also experimented with the coil spring electrode and the Court of Appeals dealt with that very summarily and dismissed it on the ground mere experimentation and belief would not avail the party anything.

Now, turning to the Stearns patent itself, your Honor, the patent does not describe a pusher anything like the discarded or abandoned Exhibit B. It describes a pusher which has wheels or rollers. One such pusher is shown on Fig. 10 of the patent, your Honor.

If you will turn to the Stearns patent, Fig. 10 is on sheet 4 of the drawings, the first set of the drawings, in the upper right-hand corner of that drawing, if you will turn it around edgewise.

Now, rollers are shown in Fig. 10. The pusher

is shown. There are wheels 46 and 47, which contact the pipe, your Honor. They are the lower set of wheels. They roll on the pipe.

Then there are wheels 44 and 45, which are in contact with the wheels 46 and 47, and are driven and rotated by it.

Now, quoting from the Stearns patent—I am now referring to page 2 of the description, the right-hand column, [43] lines 47 to 56—I am quoting as follows:

“It is intended that when the wheels 46 and 47”——

Those, your Honor, are the wheels which roll on the pipe.

“* * * when the wheels 46 and 47 are employed, they shall serve as friction wheels to provide frictional engagement with the surface of the pipe and with the wheels 44 and 45, so that when the device is moved along the pipe, the wheels 44 and 45 will be made to rotate. These wheels in such case are provided with knurled surfaces 55 which are intended to contact the exploring electrode, which is in the form of a coiled spring 56.”

Now, your Honor, there is only one other form of pusher shown in the Stearns patent, and that is shown in Fig. 15. Fig. 15 is in the first page of drawings in the upper left-hand corner, if you will turn to that.

Now, I would like to quote the description.

Referring to Fig. 15, there are only two wheels shown, 68 and 69. Those rotating on the pipe are omitted.

I would like to refer you now to the text of the specification, which is on page 3, left-hand column, lines 4 to 7, beginning at line 4, and I quote from the Stearns patent:

“It has been found that under many circumstances the use of the wheels 46 and 47 is unnecessary and under such circumstances these are omitted as shown in Fig. 15.” [44]

Thereafter, your Honor, follows a detailed description of this type pusher, and then dropping down in the same column, the same paragraph, to line 24, I quote again:

“Wheels 68 and 69 must rotate easily to cause proper propulsion of the electrode while permitting it to rotate.”

Now, your Honor, I think we are all agreed if there is an ambiguous term in a claim, we must go to the specification in the drawings to determine the meaning of that phrase. One case in point is *Schriber-Schroth vs. Cleveland Trust Company*, which is referred to in our brief, and another one is *Snow vs. Railway Company*, 121 U. S., page 617. I would like to quote from the *Snow* case, because I think the language is applicable to the situation here. This is from page 630 of the Report.

“It is not admissible to adopt the argument made on behalf of the appellants that this language is to be taken as a mere recommendation by the patentee of the manner in which he prefers to arrange these parts of the machine. There is nothing in the context to indicate that the patentee contemplated any alternative for the arrangement of the piston

and piston rod. The arrangement of the valves, as shown in the drawings, he declared not to be essential, and explained how they might be otherwise adjusted, and the comparative advantage [45] and disadvantage of those plans; but no such language is used in reference to the connection between the piston and its rod."

I think that language can be applied without change to this substituting one part for the other.

The defendant has said definitely they must use wheels, they must either be positively driven as shown in Fig. 10 and as finally set forth in the specification, or, if they are not driven, they must rotate easily in order to obtain proper operation of the electrode. What does that mean? It means they must be there.

Now, your Honor, we submit that the history of the Stearns invention prior to the application, the fact that he experimented with a pusher resembling ours, and then discarded it, and he discarded it for a reason, because he thought it was not a proper type pusher, that, taken in connection with the very clear language of the patent that wheels must be used on the pusher and they must be either driven or at any rate rotated, he said, that, taken in connection with this further fact that that critical language, means rotatably engaging, which appears in Claim 1, was inserted by amendment.

The examiner rejected Claim 1, which was Claim 3 of the application and became Claim 1 of the patent. In response to that rejection, that language was put in. It was put in for a purpose. The purpose

was to persuade the examiner, and [46] it was allowed on that basis. The applicant is estopped to assert any further scope to that claim than is plainly stated on its face.

The Court: If I understand your argument correctly, then, if you take the Stearns detector and you copy it, except in the pusher, in the bar, you didn't use a wheel, but you used a flat surface, there wouldn't be any infringement.

Mr. Gregg: Your Honor, we don't minimize it. We think that is a very important difference and we think it is borne out.

The Court: Well, assuming that is the only difference, there certainly must be some cases wherein a patent, where the patent calls for a wheel and the infringer didn't use a wheel but used a flat surface. There must be some cases along that line, certainly.

Mr. Gregg: There are some cases, your Honor.

The Court: What did the courts hold? The fact that they used a flat surface instead of a wheel, was that sufficient to cause a voidance of the patent?

Mr. Gregg: Your Honor, the precise mechanical analogy, I don't have a case on that, but I do have a case—there are a number of them cited in our brief, but I would like to direct your attention to a Supreme Court case, Exhibit Supply Company vs. Ace Patents Corp., 315 U. S. 126. Now, that case deals with the doctrine we are concerned with here, the doctrine [47] of file wrapper estoppel. The patent may be entitled to a range of equivalents so

that the substitution of one part for another would not nevertheless avoid infringement.

Now, we contend strenuously, your Honor, the part we substituted is quite different functionally, but assuming the contrary, nevertheless, they are different articles, the pusher that we use and the pusher that they use. They could only embrace ours within the scope of Claim 1 if they rely on the doctrine of equivalents, but as plainly set forth in the Exhibit Supply case, if there is file wrapper estoppel, you cannot invoke the doctrine of equivalents. You have wilfully, voluntarily, relinquished a position in the Patent Office in order to persuade the Patent Office to allow the claim, you have inserted a limitation, and you cannot then rely upon the doctrine of equivalents to expand it.

The Court: Well, let me ask opposing counsel. Have you got any case in which the infringer, instead of using a round surface, used a flat surface? Instead of using a ball, he used a flat surface?

Mr. Simms: Your Honor, I don't have a case that refers to those mechanical elements, but I do have a case I think is very controlling in the law set out, and that is that you have got to remember—well, the case is *Kennedy, et al., vs. Trimble*, 99 F. (2d) 786-88. At 788 is where I think the pertinent portion is. [48]

The Court: 99 F. (2d) 786 at 788.

Mr. Simms: Yes. Now, the significance is this, your Honor. Claim 1 doesn't call for rollers. Claims 2 and 3—

The Court: No, but your diagrams do.

Mr. Simms: That is true, your Honor. But claims 2, 3, 4, 5, 6 and 8 all call for rollers. Now, here is what the court stated, that where you have a broad generic statement in one claim and a specific statement in another claim, that it is improper to restrict the broad statement to what is shown in the patent drawings. This is a quotation:

“We have said that a court should never interpret a positively recited generic expression as limited to the precise instrumentality disclosed by the patent, except for such narrow interpretation as is necessary to distinguish the claim from the prior art.”

That was not necessary, as pointed out by the Court of Appeals. The Court of Appeals said that the important thing here was to attach this spring so that there was nothing to pull it away from the pipe, and to provide a means for rolling it and making the electrical connection.

That is the terminology of the claim, and where another claim has a specific statement, you can't imply the specific limitation to the broad claim. This quotation continues:

“Where a patent contains both a broad and [49] a narrow claim and the suit is brought on the broad claim, the court will not read into the broad claim a limitation not therein expressed, but which is expressed in the narrower claim. To do so would be to change the contract between the public and the patentee.”

Now, the patent statute provides that you don't need to show all your embodiments.

The patent is under Section 112 of 35 U.S. Code.

“The specification shall contain a written description of the invention and of the manner and process of making and using it in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.”

He sets forth what he contemplated to be the best mode, but is not limited to the best mode.

The inventor thought that it was much easier to go down the pipe and to roll the electrode with one hand than it was to use a block or a wand type pusher, in other words, a non-rolling bearing, and have to use your hands to operate the device. [50]

The inventor showed his preferred method. He gave a complete description and claimed the invention with the rollers or without the rollers.

Now, in claim 1 he claims invention and in claim 7, without specifying rollers. In all the other claims he specifies rollers. That is a fundamental point of patent law.

I have got several other decisions like that, if you would like them, to that effect, that where a claim is generic, you can't imply the limitation contained in another claim into the broad claim.

Claim 1 does not contain rollers. Other claims do contain rollers. It is improper to imply the rollers into the broad claim.

The file wrapper, I do want to comment a little bit on that. When the words "rotatably engaged" were inserted, along with that insertion was a comment in the form of remarks, the argument to the Patent Office. In that argument it was pointed out that the prior patents that were relied upon by the examiner, which showed springs as connectors, in none of those was the spring free to roll. It couldn't roll. As amended, the claim definitely provides that the spring is free to roll and not drag.

Now, here is that statement from the file wrapper.

Mr. Gregg: Will you locate the portion of it, Mr. Simms?

Mr. Simms: It is in amendment A. [51]

"Claim 3 has been amended to specify that the means forming the movable electrical contact with the spring rotatably engages the spring and rolls the spring along the elongated member which is being tested."

That is the important thing, to rotatably engage it and move it and move it along the pipe.

It is pointed out that in neither of the patents to Lenz, Guy or Jensen—that is what the examiner had relied upon—is the coiled member capable of rotation along the member which is to be tested, and in no case is it mounted so that it could be rotated or rolled along such member.

In each case the means which engages the coiled member would hold it against substantial rotation.

It is therefore respectfully submitted that claim 3 should be allowed over the patent to Barlow taken with the three patents above referred to.

That is a very clear statement that the thing which distinguishes this claim is that we have a connection which is capable of rolling that spring where you didn't have that kind of connection in the prior art. That is the thing that the Court of Appeals said constituted invention, that Stearns was the first to roll the spring instead of dragging it.

So the Patent Office allowed the claim with that argument. The Court of Appeals has sustained it upon a very [52] similar argument, that means rotatably engaging means to permit the rolling.

Now, a pencil wouldn't do it because it wouldn't make an electrical contact, but here we have all the parts. We have the means engaging it or rolling it along the pipeline, and for electrically connecting it to the high voltage test unit.

Your Honor, this isn't even a case that requires equivalents, I mean that is within the terminology of the claim. This doesn't require any equivalents. That is a means rotatably engaging. If it were not, it couldn't roll.

That is the thing we pointed out to the Patent Office, that the claim now provided a means for engaging, to roll the spring along the pipe.

The Court: All right. You can proceed.

Mr. Gregg: Your Honor, I would like to hand you a copy of Defendants' Exhibit HH for convenience and reference, that being a description of the history of claim 3 of the Stearns application, which became claim 1 of the patent. You will note certain language which was interlineated, part of

which is the rotably engaging—I believe that is a typographical error, it should be rotatably engaging, and other language was added at the same time, and for rolling said spring along said member.

A good deal, if not all of the remarks of the attorney for Mr. Stearns in connection with that amendment which [53] Mr. Simms has called to your attention could well apply to the language, “and for rolling said spring along such elongated member.” But the means for accomplishing that result was rotatably engaging.

There is very clearly, your Honor, an ambiguity with regard to that.

Why do we have to go back to the ambiguous statements that were made by the attorney in the argument before the patent examiner when we go to the very document, the patent itself, which says so plainly on its face, you must use wheels and if you don't drive the wheels, at the very least they must rotate easily; otherwise you don't get proper propulsion of the electrode. Those are facts, your Honor, coupled with the testimony of Stearns that he satisfied himself that a block type pusher would roll the spring, but it was no good and he abandoned it, and he didn't describe it in his patent.

One or two other points, your Honor, raised by Mr. Simms' argument. He used the phrase contract with the public, that it would violate the contract of the applicant with the Patent Office to narrowly construe the claim. That can apply the other way. Here the contract with the public was that the claim was to be limited to means rotatably engag-

ing, and if he hadn't put that in, he wouldn't have got it. He isn't entitled to any doctrine of equivalents and he must rely upon it in this case. [54]

Also with regard to a remark by Mr. Simms that an applicant is not required to show all the embodiments of his invention, that is true. That is a correct statement of the law. But when he points to some particular claim—to use the example, the analogy you drew, your Honor, about a man who takes 50 parts and assembles them together, uses this part and this part and this part and some other part, and as to a great many of them, he makes no particular remarks, whether he would substitute something for it or not, but he focuses attention on one particular part and he says this must be and must operate so-and-so, that brings us precisely within the *Snow vs. Railway* case, where an applicant cannot blow hot in the Patent Office and then cold later on.

That concludes my argument as to the infringement issue. I have also concluded my argument with respect to the validity of the claims, repeating that if the claims are properly construed, we have no quarrel with them, but if they are to be stretched to cover our device, we think they are invalid.

That still leaves the issue of misuse, which I have not touched upon, and I would like to make a further offer of evidence in connection with the letter which is now marked for identification as Defendants' Exhibit LL, an identical letter to another customer in connection with the charge of unfair competition. I don't know whether you de-

sire I go into those issues at this time, or give Mr. Simms an opportunity. [55]

The Court: If the only argument you have about misuse is something that happened after the trial of this case, then I have sustained the objection to the letters.

Mr. Gregg: The misuse issue——

The Court: If you don't have any evidence of any misuse in the record prior to the filing of the complaint, I don't think I will hear any——

Mr. Gregg: We do, your Honor, have evidence of misuse.

The Court: What evidence have you got in the record of misuse?

Mr. Gregg: I will be glad to go into that, your Honor. Our position briefly is this, and this goes not to the recent activities of plaintiff in connection with threatening our customers with infringement and, we believe, misrepresenting the holding of the Court of Appeals, but this topic I am going to discuss now has to do with events that occurred prior to the trial. Very briefly, it is this. We contend that the plaintiffs are not entitled to relief even if the patent were held valid and infringed, they are not entitled to relief, because they have been using their patent to obtain a monopoly on unpatented materials. Now, the cases on misuse, beginning with Motion Picture Patents Company——

The Court: Yes, I am familiar with that rule of law, but where in the evidence is there any evidence of misuse?

Mr. Gregg: All right, your Honor, I will get right to it. [56]

The claims of the Stearns patent, even if they are broadly construed, your Honor, as broadly construed as plaintiff seeks to construe them, still cover only a small portion of the Stearns holiday detector.

Now, I would like to point out Mr. Stearns testified, and the point of his testimony is the transcript pages 134 and 135, that the electrode and the pusher combination, this being the electrode and the pusher right here, costwise accounted for only about 10 per cent of the cost of the complete Stearns holiday detector, that the electrical apparatus, which is in the case and which forms a major part of the detector, is not involved in this patent suit at all, it is not covered by the patent, and in fact it is disclaimed on the face of the patent.

We refer to the Stearns patent, page 3, column 1, line 75, where the following language will be found:

“While it has been explained that the actual structure and arrangement of the electrical high voltage source in the cabinet 15 forms no part of this invention * * *”

Therefore, we are concerned with a patent on a few elements of mechanical equipment, but along with it Mr. Stearns provides customers with a complete detector, including a great deal of equipment——

The Court: Well, is there anything wrong with that?

Mr. Gregg: There is in the way he handles it, your Honor, which I am now coming to. Stearns

testified, and his testimony [57] will be found in the transcript, pages 131 and 132, that he follows the unyielding policy of leasing only the entire detector.

We do not contend, your Honor, there is anything illegal about leasing, rather than selling, but we do contend strenuously that it is unlawful to lease in the manner in which Stearns does lease, namely, this. He will lease to customers only a complete detector, and most of that detector is not covered by his patent.

This, then, requires Stearns' customers who wish to avail themselves of the structure of the patent to take with it unpatented equipment, and that, we submit, your Honor, is a violation of the law.

One of the most recent cases on the subject, which is covered in our brief, is *Cardox vs. Armstrong Coalbreak Company*, which is reported in 194 F. (2d), page 376, *certiorari* denied in 343 U.S. 979.

The Court: 194 F. (2d)?

Mr. Gregg: Yes, your Honor, 1942 F. (2d) 376.

Now, your Honor, in the *Cardox* case the patent was on a blasting cartridge used in mining operations. The policy followed by the plaintiff in the *Cardox* case was to lease the patented cartridges only as part of what was known as an *Airdox* unit, that being their trade name, just as Stearns has a trade name. An *Airdox* consisted of the patented cartridges [58] and also an unpatented motor, compressor, and some other equipment.

The plaintiff argued in that case, just as the plaintiffs argue in this case, that this lease agree-

ment, this tying in of patented and unpatented materials, left the lessee free, if he wished, to buy unpatented material from other people, motors, compressors, and so forth, to use in them, but the court rightly observed that this was still a misuse and illegal tie-in of patented and unpatented equipment, for this reason, and I am quoting from the opinion of the court:

“The actual realistic effect on competition must be considered.”

The actual realistic effect on competition in the Cardox case was simply this, that if a lessee of an Airdox unit had to lease and pay for the entire unit, he certainly wouldn't pay double and then go out and buy unpatented materials from another source, which is precisely our opinion here, that a Stearns lessee, having to lease an entire Stearns detector, is not going to pay double by coming to Tinker & Razor, or anybody else, to buy unpatented equipment to use with it. He would be paying twice. The actual realistic effect on competition, then, is to stifle competition on unpatented commodities.

I would like to quote the language from the opinion of the court in the Cardox case at the conclusion of the [59] opinion. I am now quoting:

“There likewise is no conflict in the evidence as to the past business practice of plaintiff in only leasing its patented cartridges as part of a unit together with the unpatented compressor and other components. Although the question is not free from doubt, it is our view that under the authority of the cases cited, plaintiff's conduct constituted a

misuse of its patents, by unlawfully extending and attempting to extend the monopoly of its patents.”

Now, your Honor, there the situation is on all fours with the situation here. The lessee must take the unpatented equipment in order to get the patented equipment. The leasing practice of Stearns stifles competition on unpatented material.

Now, the plaintiffs have also urged in their brief when the case was before the court previously——

The Court: May I interrupt a second and ask a question?

Mr. Gregg: Certainly.

The Court: Let's consider an IBM machine, for instance. The IBM machine is a patented machine. It is not sold by IBM. In the construction of that IBM machine they use many, many things that are not patented.

Mr. Gregg: That is correct.

The Court: Well, they tell the lessee, “If you want to [60] use that machine, you have to use it as a whole. I won't sell you the parts that are patented, but you will have to buy what is patented, plus what is unpatented.”

Anything wrong with that?

Mr. Gregg: Your Honor, I believe there is a case involving IBM. I can't give you the precise citation. I have to review this to confirm what I am about to say. IBM had patents on its machines, IBM machines, and it would lease those machines upon condition, however, that the lessee use the unpatented IBM punch cards with them, and that was held illegal.

The Court: That is a different thing. That is something clear on the outside. If you can show that the plaintiff here required the lessee of the machine to use materials that they could have bought on the open market, but they had to buy a certain kind of material, it will be a different story. But here IBM takes unpatented things and incorporates them into the machine.

Mr. Gregg: Your Honor, we think the Cardox case is a complete answer to that.

The Court: Your cards are entirely separate from the machine.

Mr. Gregg: No.

The Court: They were demanding that you not only use the machine, but you use the cards that go into it. Anybody could have made the cards. [61]

Mr. Gregg: In the Cardox case, your Honor, the Airdox unit—this has nothing to do with IBM machines, but this has to do with equipment for blasting in mines—the Airdox unit consisted of patented cartridges and unpatented material.

The Court: Is that that 194 F. (2d) case?

Mr. Gregg: 194 F. (2d), yes, your Honor. The plaintiff in that case drew attention to the fact that although the lessee was required to lease the complete Airdox unit, nevertheless, he was not restricted, he could lease it and then go out and get somebody else's unpatented parts to use with it, but the court made the common sense observation, "What is the practical effect of that? If he has got to pay for a complete Airdox unit, including the unpatented parts, he is not going to put them on

the shelf and go out and purchase or lease others to use with the patented parts.”

The inevitable effect, the practical effect, is to stifle competition in the sale of unpatented materials.

There is testimony in the record here that there is a substantial market for components of detectors, many of which are unpatented, but anybody wishing to obtain from Stearns the invention of the patent that is involved here cannot do so unless he takes a great deal of unpatented material. Cost-wise, the major proportion of the material is unpatented.

We predicate our case on that.

The Court: Well, I notice it's 12:00 o'clock. I can only [62] give you the rest of the afternoon. I cannot give you any other time. I gave you today because I had a criminal case that did not go to trial.

Mr. Gregg: I am sure I can conclude my argument in not more than a half hour.

The Court: Well, of course, the other side wants to be heard, you know. There may be some argument on the other side.

Mr. Gregg: I will cut it down to less than that.

The Court: All right. Court will now stand in recess until 2:00 o'clock this afternoon.

(Thereupon, a recess was taken to [63]
2:00 p.m.)

November 10, 1955—2:00 P.M.

The Court: You can proceed.

Mr. Gregg: Your Honor, I think it will take me only about 10 or 15 minutes to conclude my argument. I left off at 12:00 o'clock in connection with our defense of misuse.

I would like to remark briefly about the plaintiff's licensing policy. I have commented upon their rental or leasing policy. They do extend licenses, but this does not remove any illegality that arises out of their leasing policy. In the first place, if the lease policy is illegal, it is illegal without regard to whatever their license policy may be.

Secondly, the inevitable practical effect of their licensing policy is to require the licensees to conduct business in the same manner that the plaintiff does.

Now, there are two forms of license which are in evidence as Defendants' Exhibits AA and BB. One of them licensed people to sell and the other to use the patented electrode pusher combination, and the royalty required under the license is \$250 for each of the electrode pusher combinations.

Now, Mr. Razor has testified in this case, his testimony is uncontradicted, it appears in the transcript, pages 449 and 450, that the defendants sell an electrode pusher combination for a price of \$22.50. A \$250 royalty would be a royalty in excess of 1,000 per cent. As a result, the only [64] practical way that a licensee could afford to pay \$250 royalty would be not to sell the separate parts themselves,

but to sell them or lease them only in conjunction with the patented detector, which is precisely the plaintiff's way of doing business.

Now, your Honor, I would like, in connection with the letter to Pioneer Natural Gas Company, which has been marked for identification as Defendants' Exhibit LL, to make an offer of proof in that connection, and also in connection with an identical letter sent to El Paso Natural Gas Company, which I would now like to have marked for identification.

The Court: It may be marked for identification.

The Clerk: Defendants' MM for identification.

(The document referred to was marked as Defendants' Exhibit MM for identification.)

Mr. Gregg: I would like to offer both LL and MM in evidence, and I presume Mr. Simms will wish to make an objection.

Mr. Simms: I object, your Honor, on the grounds previously stated.

The Court: I think he is entitled to make his offer of proof.

Mr. Simms: I merely object to the introduction, your Honor. I don't object to the offer of proof.

The Court: It has only been marked for identification.

Mr. Gregg: I would like to make an offer of proof now. [65]

The Court: Make your offer of proof.

Mr. Gregg: The offer of proof in connection

with the exhibits marked for identification as Defendants' LL and Defendants' MM is as follows:

We would prove by these documents, and by proper identification thereof through witnesses if the counsel for the plaintiffs would not stipulate that they are true and accurate copies of letters actually sent out in behalf of the plaintiffs, we would prove that the plaintiffs are guilty of unfair competition. This, your Honor, is quite apart from our defense of misuse. That they are guilty of unfair competition in that they are misrepresenting to the trade that the Court of Appeals has held the Stearns patent to be valid.

We believe the Court of Appeals did not so hold and that this is a misrepresentation.

In that connection I would like to read to you a paragraph, paragraph numbered 1:

"The Court of Appeals for the Ninth Circuit has held this patent valid in the case of Dick E. Stearns, et al., vs. Tinker & Razor."

We rely in that connection upon the Celite case and upon Hall vs. Wright, which I referred to this morning.

That is our offer of proof in that connection.

The Court: The offer is rejected.

Mr. Simms: I object, your Honor. [66]

The Court: The offer is rejected.

Mr. Gregg: That concludes our argument, your Honor.

Mr. Simms: May it please the court, inasmuch as the matter of misuse was that last thing dis-

cussed by counsel, I will first address that phase of the case because it is more clearly in our mind.

I think about the only thing I need to say is that the Stearns Company is engaged in the leasing of equipment. That is a well-recognized and very legitimate method of doing business in the United States. The courts have repeatedly upheld the right to lease. In *Roberts and Rock Bed Company vs. Hughes Tool Company*, the leasing was upheld. In the *Shoe Machinery* case, which is cited in my brief, the leasing of machinery for making shoes was upheld. Repeatedly that has been considered a proper method of doing business.

Now, where the misuse has come in is where there has been carried on business so as to extend the monopoly to something outside the patent. The *Cardox* case seems to be the one that was primarily relied upon by the defendant. In that case the patent covered a cartridge which was merely a container with a valve for charging air into and out of the cartridge, charge air into it and release it so as to give a blast for breaking coal.

But look at the other material which you had to buy or had to get from the patentee in order to get the cartridge. [67] Each such unit includes five of the *Airdox* cartridges patented by plaintiff, and a motor, a compressor, four blow down valves, three line valves, three unions, 3,000 feet of steel tubing, 500 feet of copper tubing, and all necessary connectors, all of which, as far as this record discloses, are unpatented.

Right back to the same International Business

Machines case involving the cards. The same type of situation.

The inclusion of patented parts of machinery in the United States, if you will just stop to consider, you can assume that General Motors has many patents, maybe on an ash tray, perhaps on a transmission. I assume that they sell a Cadillac automobile with both of those two patented items on it. It is a misuse, according to the defendant's contention.

It seems so highly impractical and unrealistic, and there are no cases to my knowledge, and the defendant has not cited any that go anywhere near that far. Repeatedly the leasing of goods has been upheld as a legitimate business practice.

On the question of our licenses, Stearns has made available on a license basis the fruits of his invention. There have been numerous, and the record shows, licensees. They apparently live under the license program.

The defendant, on the other hand, presumes to ignore this exclusive right that Stearns received. By the patent [68] Stearns is entitled to the right to exclude. That is the basis of the patent. That's all he has. For that right he has given the public in the form of his patent the disclosure of his invention.

Now, what is that invention? The Court of Appeals in deciding what was the invention didn't go into the question of here is a roller and we don't find rollers in any of this prior art. That wasn't the

invention. That isn't what the Court of Appeals said was the invention.

The Court of Appeals said that the thing that was the invention was to provide a means or pusher which rotably engages a spring to roll it along the pipe, and that is exactly what this instrument of the defendants does. And form an electrical contact with it.

Now, all at once the word "rotatably engaged" has become something we can't understand, according to the defendants' theory. But the Court of Appeals apparently understood it. I am quoting from their decision.

"In the Stearns detector, the pusher rotably engages and forms a movable electrical contact with the spring electrode so as to roll it and connect it electrically to the high voltage test circuit;"

I think it is unnecessary for me to go into a restatement of what I stated earlier about the prosecution of [69] the Stearns patent, but it is clear that this is what Stearns has done. He has complied with the patent statute. The patent statute says that the inventor will disclose that which he believes to be the best way to practice the invention.

Now, Stearns thinks that this is the best way to practice the invention, is to provide the pusher on the carriage so that it is a one hand operation.

It is interesting to note that so did the defendant think that is the best way to do it, because that is the way they first did it. They made it just like Stearns. They copied Stearns down to the gnat's

eyebrow. Their description fits the Stearns patent like it was a written specification of it.

The only reason that they advance for the change, the one reason is that on advice of counsel they thought they should get a little farther from the patent.

Your Honor, I don't think they got nearly far enough from the patent, because claim 1 does not call for any kind of rollers. Claim 2 does call for rollers.

The cases are numerous and the law is well established that you cannot imply to a broad term in one claim a limited meaning, the limitation of which appears in subsequent claims.

The Court: When your claim 1 doesn't specify, doesn't say a roller, doesn't say a block, doesn't say anything, does [70] it include everything?

Mr. Simms: It includes any means which will perform the functions out.

The Court: Then in not claiming in 1, you claim everything, is that it?

Mr. Simms: Every means which will perform the function. That also is in accordance with the patent statute, that an inventor may include an element in his claim——

The Court: Where is your authority for your statement that if in your claim you don't claim everything specifically, you naturally claim everything, known and unknown?

Mr. Simms: Your Honor, when you say you claim everything, that is an awfully broad statement. I don't know as I positively follow your

meaning, but you claim everything that operates in the same way, do substantially the same thing, and give the same results.

The Court: Under your theory, then, as far as claim 1 is concerned, it doesn't make any difference whether you use a roller or whether you use a bearing, or whether you use a block. It doesn't make a particle of difference, does it?

Mr. Simms: It doesn't make any difference in the practice of the invention, and that is our contention.

The statute says—let's see if I can't locate it here. I can paraphrase it anyhow, your Honor. It is to this effect, that the inventor may claim means for accomplishing a [71] result, and that when that is in a claim, that it will be interpreted as encompassing all the things which are substantially equivalent to the things shown.

The Court: Supposing I create a gadget. It is an invention. Then I claim that this invention will do certain things and I specify them. Supposing I don't make any claim at all. I just say it will do everything. Do I get everything or don't I have to specify what it will do?

Mr. Simms: I think in that instance the Patent Office would turn you down to start with.

The Court: They would require you to be specific, wouldn't they?

Mr. Simms: That's right.

The Court: You haven't been specific. You just said it will create or it will accomplish certain things.

Mr. Simms: No. I think, your Honor, that we have been specific.

The Court: Well, all you say is——

Mr. Simms: Let's read here.

“* * * and means rotatably engaging and forming a movable electrical contact with said spring * * *”

Now, that is setting out the structure, that is setting out the means that will engage this and pass electricity through a moving engagement.

The Court: You don't contend that the only thing that [72] will produce that particular result is the arm and connection you have?

Mr. Simms: Not whatsoever. Anything that will make that engagement and connect the spring to high voltage testing circuits for rolling such spring along such elongated member.

The Court: Then it is your contention that if any other detector uses a means of rotatably engaging and forming a movable electrical contact, that it is covered by your patent regardless of the shape and regardless of how the contact is made?

Mr. Simms: May it please the court, it is difficult to say any other detector regardless, without seeing the structure. I definitely contend that it includes this. There conceivably could be some method that might avoid it, but we don't have it here.

The Court: Isn't it your contention that it doesn't make any difference what kind of a connector they have, whether it is a rod or by wand or by a tongue, as long as it does these things, it is an infringement of your patent?

Mr. Simms: That is substantially our position, yes, your Honor. That is the thing that was pointed out to the Patent Office to distinguish this invention. That is the thing that the Court of Appeals held distinguished it in part.

Now, one of the most common and practical methods of testing an invention is to see what the invention was. [73] Certainly, even though a claim might cover it, if it were clear outside the invention, a lot of cases hold you can't extend a patent to that extent, but here we don't have that. They have set out to do the same thing, to accomplish the same results. They accomplish identical results. They accomplish those results in substantially the same manner. They do it in the same way. They are going to inspect these holidays with the same rotary movement. The attachment is such that our electrode is supported by the pipe.

The Court: The only difference here is the connector. They do substantially the same work. They produce substantially the same result, they get substantially the same results. But the claim is made that if they don't use the rollers, if they use something else besides rollers, they are not infringing.

Mr. Simms: That is their position, your Honor. That is a position that is contrary to the prosecution of the application, to the statement made to the examiner as to the meaning of rotatably engaging. It is contrary to everything except this desire to use the same invention, to—I will use the word pirate. That is what the courts use. They pirate the invention. They want to accomplish all of these results, but they want to do it outside of the patent.

The real invention here isn't in the rollers, because rollers are old. The real invention was in connecting [74] these high test circuits with the spring in such a manner that the connection leaves this free, that it leaves the spring free to roll along the pipe, and make that electrical connection while you are doing it. Now, that is the invention. The preferred way was this.

Now the defendants are taking the position that having complied with the statute, to show a preferred method, Stearns is precluded from claiming anything but his preferred way, and we will use a slightly less preferred way in order to avoid the patent.

The Court: Let me ask you a question. Supposing over a long period of time people have learned to do a certain thing, to accomplish certain results, and then somebody comes along and invents a machine or perfects a machine that will accomplish exactly those same results in practically the same way, except instead of doing it by hand, you do it by machine. You do it faster by machine. Your machine can work faster than the hand. But it does practically the same thing.

Is there invention?

Mr. Simms: Your first development was not a machine?

The Court: No. You develop it by hand. You learn to do it by hand.

Mr. Simms: We might take a chicken-picking machine, is that right?

The Court: Then somebody comes along and says the hand [75] is too slow, so let's see if we cannot make a machine and speed it up. They do it. They accomplish exactly the same result. The only difference is one time they do it by machine, another time they do it by hand, and by the machine you can do it much faster because it is a machine. Is that invention?

Mr. Simms: It could well be an invention, your Honor. It would depend on the circumstances in that case.

The Court: If it is an invention, then continuing to do it by hand is not an infringement, is it?

Mr. Simms: It is not an infringement, no, sir.

The Court: It does the same thing, accomplishes the same results.

Mr. Simms: Well, that came before. The thing is the patent cannot be construed so as to encompass something that went before. In other words, the defendants are perfectly free to use the old Mudd electrode, because that came before.

The Court: That is, they are perfectly free to drag the electrode along the pipe.

Mr. Simms: To drag it along the pipe with Mudd's contraption, and we couldn't touch him on that at all, because we cannot interpret our claim so as to encompass that which went before.

The Court: Well, your real invention then is the fact that you have worked out a procedure by which you can get the electrode to roll. [76]

Mr. Simms: And making the electrical contact.

The Court: Instead of being dragged, it will roll and keep the electrical contact.

Mr. Simms: That is the invention.

The Court: Well, the defendant does the same thing, except they do it a little bit differently.

Mr. Simms: In a slightly different way.

The Court: They have more hand work.

Mr. Simms: Well, that's right, they have a little more hand work in theirs.

I think Justice Jackson made a statement that is rather important. In *Graver Tank vs. Linde Air Products*, he pointed out it is a rather dull thing for an infringer to make a Chinese copy of a patent. Always they will make little changes, and the patent system is not to be circumvented in that fashion by slight changes, because that rewards the cunning of the trespasser, instead of the ingenuity of the inventor who gave it to the world.

Now, they started out as one of those rather dull things, an exact copy, and realized it was a little too close, and tried to change, but in changing it, they have adopted the basic invention of the Stearns patent. Their equipment is stated by Mr. Rasor on examination to do everything that the Stearns will do and maybe more, and maybe then some. It will do everything. [77]

They didn't go to Mudd. They didn't drag their spring. They don't want to today. They are in here fighting strenuously over a period of seven years to keep from doing that, which merely demonstrates the value of the contribution of the Stearns patent.

Now, the patent only has a few more years to

run, but until it does run, Stearns by law has the right to exclusion.

We think this is one of the glaring cases of a defendant going out and merely copying exactly the thing that was being done, making a very slight change in it, and then picking up all the little technicalities.

In the first place, all the United States business is out of kilter. They are on the wrong step, because they have machines, radios, television, cars, airplanes, that have a patented item on them, and they don't sell the patented item separately. They sell an airplane. All of the aircraft industry is clear off base.

The interpretation as given this claim to the Patent Office is clear off. We have got to come down here and find some little word which says these wheels must rotate freely. That doesn't mean it must rotate freely. It means you have to use wheels, they say, but where did they get the bridge over there? It isn't in there.

Your Honor, I think at this time I want to close and make this observation, that I have prepared some proposed findings [78] of fact and conclusions of law, thinking they might be of some assistance to your Honor, so I would like to submit them for whatever assistance they might give you.

The Court: I will be glad to have you submit them.

Mr. Gregg: Your Honor, we have never seen these proposed findings of fact at all. We have had no opportunity to comment on them.

The Court: Well, if you want to submit some proposed findings of fact and conclusions of law, I will allow you to do so, also.

Mr. Gregg: That's fine. That is perfectly all right.

The Court: I don't intend to decide this today, because I want to go back and read your briefs and authorities. Also, I would like to have a transcript of your arguments today. I wish that either the plaintiff or the defendant would authorize the reporter to write up your arguments today. I would like to have them so I can review them.

Mr. Simms: I suggest that we agree to pay equally and have that done.

Mr. Gregg: That is quite agreeable.

The Court: So if you want to examine the proposed findings of fact and conclusions of law as presented by Mr. Simms, you may do so, and you can either file objections to them or you can prepare a set of your own and submit them.

Mr. Gregg: Fine. [79]

The Court: I would rather that you prepare a set of your own.

Mr. Gregg: We will do that, your Honor.

Mr. Simms: What time, your Honor, should the parties have?

The Court: I would suggest that you present them within ten days. I don't know just when I am going to be able to review your briefs. I anticipate from what you say they are extensive.

Mr. Gregg: Your Honor, I think I could possibly do it in ten days. I would like to point out the

plaintiffs have somewhat of an advantage. They have already prepared theirs. This takes me by surprise. I had no idea you would want or would entertain findings of fact until you had had an opportunity to decide the case.

The Court: Maybe it is premature, because I may find for the defendant. If I have the defendant's findings of fact and conclusions of law, then I can look them over and see whether or not they coincide with my findings. If I decide for the plaintiff, I will have the plaintiff's findings.

Does it make any difference whether they are prepared after I make the decision or before?

Mr. Gregg: No. I have no objection to the findings. Will you give me 20 days, and I will make every effort to get them in in 10 days? [80]

The Court: All right. We will give you 20 days. Let's get a definite date on this. That will be the 1st of December.

Mr. Simms: 1st of December. That's fine.

The Court: In the meantime, in the 20 days I might have a chance to read your authorities and your briefs.

Mr. Simms: Your Honor, I would like to comment. I assume the court has practically adjourned here.

The Court: I don't know.

Mr. Simms: It has been a pleasure to be here again.

The Court: I don't know about that. The other side may have something more to say.

Mr. Gregg: I would just like to make one com-

ment, your Honor. In connection with the Graver case, it seems to me it is quite evident that the plaintiff is now relying upon the doctrine of equivalents in connection with claim 1. I would like to point out in the Graver case the facts were this, that the claims called for a flux including, as I recall, calcium as one of the components, or calcium salt, and the defendant used magnesium salt, and the question was whether magnesium was the equivalent of calcium, and in the patent involved in the Graver case, it was specifically stated in the specification that magnesium could be used as well as calcium, and there was testimony at the trial one was equivalent to the other. Whereas in this case, we are relying upon file wrapper estoppel and we are relying upon the very positive assertion in the patent [81] that wheels must be used and they must either be driven or they must rotate easily in order to cause proper propulsion.

The Court: Have you got a case where the patent says or the claim says in order to obtain the result you have to use Salt A. Then somebody comes along and uses Salt B. No mention in the claim about Salt B, but somebody uses it.

The defense is that the claim says Salt A. If you don't use Salt A, then you are at liberty to go ahead and follow the same procedure as long as you use Salt B. Have you got a case like that?

Mr. Gregg: We certainly have cases, your Honor. One of them is the Snow case. Taking the hypothetical case you refer to, the patent says Salt

A and says nothing about Salt B, nothing whatsoever about it, your Honor, about it being usable or not. The defendant comes along and uses Salt B. It is open to the plaintiff to prove that Salt B is in fact an equivalent of Salt A.

But let's take another hypothetical case where the patent mentions——

The Court: Supposing it is equivalent. Suppose it is just a question of salt. Let's say the claim is use nitric acid. Somebody comes along and uses sulphuric acid. They find out it does the same thing and is just as good. The claim is for nitric. Nothing in the claim says other acids may be [82] used, such as sulphuric acid.

Mr. Gregg: Your Honor, I think I could best call upon the Exhibit Supply Company vs. Ace Patent Corporation, which I cited to you this morning as follows. I am reading from page 11 of our brief:

“Assuming that the patentee would have been entitled to equivalents embracing the accused device had he originally claimed a ‘conductor means embedded in the table,’ a very different issue is presented when the applicant in order to meet objections in the Patent Office, based on references to the prior art, adopted the phrase as a substitute for the broad one ‘carried by the table.’ Had claim 7 been allowed in its original form, it would have read upon all the accused devices, since in all the conductor means complementary to the coil spring are ‘carried by the table.’ By striking that phrase from the claim and substituting for it ‘em-

bedded in the table' the applicant restricted his claim to those combinations in which the conductor means, though carried on the table, is also embedded in it. By the amendment, he recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference." [83]

I don't think it is necessary to read any more of this opinion. I think that aptly describes what happened. When he did that, it can mean only one thing, and that is that he abandoned his claim to anything else.

The Court: Mr. Simms, have you got anything else you want to say?

Mr. Simms: Just one more thing. The claim called for Salt A and this is Salt A. It is not anything else.

We put the words in the claim, "means rotatably engaging." Before that it just means engaging to do these things. So we restricted it down to things which rotatably engage the spring to rotate, able to rotate the spring, and this is, you might say, Salt A. They claim Salt A, they have Salt A.

We didn't claim rollers. They don't have rollers. We have rollers in another claim and we can't read that claim on the structure, but the claim wasn't restricted to rollers. It was restricted to means rotatably engaging and forming a movable electrical contact with said spring, to roll the spring and connect the spring to the high voltage testing circuit, and that is what they do.

The Court: All right. I will give you 20 days to

file your proposed findings of fact and conclusions of law, and the matter will stand submitted.

In the meantime, I will read your authorities and [84] briefs, and some time after the 20 days I will let you know my opinion, my conclusion. [85]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of November, 1955.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of Cali-

fornia, do hereby certify that the foregoing pages numbered 1 to 51, inclusive, contain the original

Second Amended Complaint;
Answer to Second Amended Complaint;
Plaintiff's Reply to Defendants' Counter-
Claim;
Mandate;
Findings of Fact and Conclusions of Law;
Order Re Plaintiff's Motion to Amended and
Modify Final Judgment;
Final Judgment;
Notice of Appeal;
Designation of Record on Second Appeal;
Statement of Points on Appeal;
Order Staying Execution of Costs Pending
Appeal;
Petition for Order Staying Execution of
Costs Pending Appeal, etc.;
Order Extending Time to File Appeal Rec-
ord and Docket Appeal;

which, together with a letter from Judge Harry C. Westover to Messrs. Gregg & Hardy that is not part of record in the trial court; depositions of J. P. Bristow, John Patrick Rasor, L. H. Tinker, G. W. Goff and of witnesses taken on the part of the plaintiffs on May 16, 1951; and seven volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing transcript amounts to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 25th day of April, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 7, inclusive, contain the original

Notice of Appeal;

Designation of Record on Appeal;

Statement of Points on Appeal;

Defendants' Supplemental Designation;

and constitute the transcript of record on appeal in the above-entitled cause, to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 25th day of April, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15111. United States Court of Appeals for the Ninth Circuit. Dick E. Stearns and The D. E. Stearns Company, a Partnership Composed of Dick E. Stearns and Ellen Belson Stearns, Appellants, vs. Tinker & Razor, a Corporation, John P. Razor and Leo H. Tinker, Appellees. Tinker & Razor, a Corporation, John P. Razor and Leo H. Tinker, Appellants, vs. Dick E. Stearns and The D. E. Stearns Company, a Partnership Composed of Dick E. Stearns and Ellen Belson Stearns, Appellees. Transcript of Record. Appeals From the United States District Court for the Southern District of California, Central Division.

Filed: April 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

Appeal No. 15111

DICK E. STEARNS, and THE D. E. STEARNS
Company, a Partnership Composed of Dick E.
Stearns and Ellen Belson Stearns,

Appellants,

vs.

TINKER & RASOR, a Corporation, JOHN
PATRICK RASOR and LEO H. TINKER,

Appellees.

STATEMENT OF THE POINTS ON WHICH
PLAINTIFFS-APPELLANTS INTEND TO
RELY

1. The Trial Court erred in construing claim 1
of the Stearns patent 2,332,182 to be restricted in
its scope by ;

- (a) The wording of the claim itself,
- (b) The specification of the patent includ-
ing the drawings, or
- (c) The file wrapper of the patent;

to apparatus employing wheels or rollers engaging
the coiled spring electrode for rolling it and elec-
trically connecting it to a high voltage testing cir-
cuit and to therefore not be infringed by Defend-
ants' devices exemplified by Plaintiffs' Exhibits
26-A, 26-B and 26-C in which the pusher wand

utilizes an inverted U-shaped bearing in place of wheel or roller bearings for accomplishing said two functions; where this restricted construction was not required by the prior art and where the Court of Appeals in finding the claim patentably distinguished over the prior art did not adopt or resort to said restricted construction.

2. The Trial Court erred in the construction of claim 1 of the Stearns patent 2,332,182 in not finding, relative to Defendants' detector Plaintiffs' Exhibits 26-A, 26-B and 26-C, that Defendants' semi-sleeve type bearing (well known equivalent of the roller bearings in the Stearns patent) fully met that portion of the claim commencing with

“and means rotatably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member”

and thus infringes the claim under the rules of construction of means clauses in patent claims provided by Title 35, U.S.C., Section 112, which reads in part:

“An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, * * * and such claims shall be construed to cover the corresponding structure, * * * described in the specification and equivalents thereof.” (Emphasis added.)

3. The Trial Court erred in construing the broad generic recitation in claim 1 of patent 2,332,182 of:

“means rotatably engaging * * * with said spring * * * for rolling said spring along such elongated member”

to be restricted to wheels or rollers, thus implying the limitation of rollers recited in claims 2, 3, 4, 5, 6 and 8 and holding the claim not infringed by Defendants’ detector because of this “implied” limitation.

4. The Trial Court erred in dismissing the Second Amended Complaint herein and in not holding that Defendants had infringed claim 1 of Stearns patent 2,332,182 by making, using, leasing and selling their holiday detectors which incorporate pushers and electrodes exemplified by Plaintiffs’ Exhibits 26-A and 26-C, respectively.

5. The Trial Court erred in construing claim 7 as restricted by the element

“an electrode pusher and contactor carried by and electrically insulated from said platform”

to holiday detectors having a pusher arm which is a

“solid, rigid, immovable structure mechanically carried by and moving with the carriage”

so as to thereby not encompass Defendants’ detector of Plaintiffs’ Exhibits 26-A, 26-B and 26-C in which the wand 26-A is carried by the carriage 26-B

by means of the flexible electrical cable, as the full structural and functional equivalent.

6. The Trial Court erred in not ruling that Defendants' holiday detector, Plaintiffs' Exhibits 26-A, 26-B and 26-C, is the full mechanical equivalent of the detector defined in claim 7 of Stearns patent 2,332,182 and therefore infringes said claim.

7. The Trial Court erred in its holding that claims 1 and 7 of the Stearns patent 2,332,182 are "invalid for failure to particularly point out and distinctly claim the invention" if they are construed to cover the device manufactured by Defendant Tinker & Razor, exemplified by Plaintiffs' Exhibits 26-A, 26-B and 26-C.

8. The Trial Court erred in its holding that the Plaintiffs are not entitled to relief for the infringement of claims 1 and 7 of its patent 2,332,182 because Plaintiffs' method of doing business and/or licensing program as they relate to the patent, constituted a misuse of the patent by employing it to monopolize and to restrain competition in unpatented materials.

BROWNING, SIMMS & HYER,

By /s/ JAMES B. SIMMS,

Attorneys for Plaintiffs-
Appellants.

Certificate of Service attached.

[Endorsed]: Filed April 26, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS TINKER & RASOR, JOHN PATRICK RASOR AND LEO H. TINKER INTEND TO RELY UPON APPEAL

The parties Tinker & Rasor, John Patrick Rasor and Leo H. Tinker intend to rely upon the following points:

1. The Trial Court erred in dismissing defendants' counterclaim for damages.
2. The Trial Court erred in awarding plaintiffs costs on the first appeal.

/s/ EDWARD B. GREGG,
Attorney for Appellants, Tinker & Rasor, John Patrick Rasor and Leo H. Tinker.

Certificate of Service attached.

[Endorsed]: Filed May 2, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION REGARDING USE OF
PRINTED RECORD ON FIRST APPEAL

Come Now the parties, acting through their counsel, and stipulate, subject to the rules of the Court, to the use in the second appeal, which bears the above number, of the printed record from the first appeal, number 13,634. This consists of Volumes I, II and III.

The parties further stipulate that the unprinted documentary exhibits be treated as physical exhibits on the appeal and may be referred to as physical exhibits by either party.

BROWNING, SIMMS & HYER,

By /s/ JAMES B. SIMMS,

Attorneys for Appellants.

/s/ EDWARD B. GREGG,

Attorney for Appellees.

[Endorsed]: Filed May 15, 1956.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Appeal No. 15,111

DICK E. STEARNS AND THE D. E. STEARNS COMPANY,
a partnership composed of Dick E. Stearns and
Ellen Belson Stearns, *Appellants,*

v.

TINKER & RASOR, a corporation
JOHN PATRICK RASOR and LEO H. TINKER, *Appellees*

PLAINTIFFS-APPELLANTS' BRIEF
ON SECOND APPEAL

FILED

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- 1) THE INVENTION HAS BEEN APPROPRIATED AND
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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Appeal No. 15,111

DICK E. STEARNS AND THE D. E. STEARNS COMPANY,
a partnership composed of Dick E. Stearns and
Ellen Belson Stearns, *Appellants*,
v.

TINKER & RASOR, a corporation
JOHN PATRICK RASOR and LEO H. TINKER, *Appellees*

**PLAINTIFFS-APPELLANTS' BRIEF
ON SECOND APPEAL**

**I. STATEMENT OF THE PLEADINGS AND
HISTORY OF THE LITIGATION**

This cause is here on appeal for the second time.¹ The cause was tried upon the issues developed by the Second Amended Complaint (R. I, p. 3)², filed by Dick E. Stearns

¹ This Court's prior opinion is reported at 220 F. 2d 49; the Trial Court's first opinion is reported at 108 F. Sup. 237—the second Trial Court decision is not reported.

² Throughout this brief the printed record is referred to by the abbreviation "R" followed by the appropriate volume number, and "p" followed by the appropriate page number.

and The D. E. Stearns Company, conveniently called "Stearns throughout this brief, seeking a judgment for patent infringement with respect to claims 1 and 7 of United States Letters Patent No. 2,332,182 (R. III, pp. 753-761), owned by Stearns, as against Leo H. Tinker, John Patrick Rasor, and Tinker & Rasor, a corporation, conveniently called "Defendants" in this brief. Defendants filed their Answer and a Counterclaim (R. I, p. 6). The answer asserts as defenses invalidity, non-infringement, and misuse. The counterclaim seeks declaratory relief of non-infringement and invalidity of the patent claims and a judgment against Stearns for unfair competition in asserting its patent, and for misusing its patent.

Following the trial, the District Court (Judge Westover) entered an opinion (R. I, p. 18), Findings of Fact and Conclusions of Law (R. I, p. 25) and a Final Judgment against Stearns (R. I, p. 32), dismissing the complaint on the ground that claims 1 and 7 of the Stearns patent were invalid as not constituting invention over the prior art. This Final Judgment was appealed and this Court reversed, holding that Stearns was an "innovator, not a follower" (220 F. 2d 49) and that claims 1 and 7 were not invalid for want of invention. The case was remanded for further proceedings.

Defendants petitioned the Supreme Court of the United States for Writ of Certiorari, which was denied, 350 U.S. 830; 100 L. Ed. 55. Whereupon, Judge Westover, pursuant to this Court's mandate, set the case down for oral argument and thereupon again held against Stearns, dismissing the Second Amended Complaint and sustaining the Defendants' Counterclaim (F. of F.³, R. IV, p. 915). The Judgment was

³ The abbreviation F. of F. in this brief designates "Findings of Fact" of the Trial Court.

modified upon motion of Stearns to allow Stearns costs upon the first appeal pursuant to the mandate and to dismiss the Counterclaim as no damage was shown to Defendants (Order, R. IV, p. 932; Final Judgment, R. IV, p. 933). The Final Judgment now appealed from dismissed the Second Amended Complaint and the Counterclaim.

This last Judgment held in effect that the Stearns patent is so limited as to not be infringed except for four holiday detectors manufactured and sold by the individuals and not enforceable as to these because of Stearns' misuse of its patent.

A. Jurisdiction

The jurisdiction of the Trial Court was not contested and was based upon the Patent Laws of the United States, namely, Section 1338(a) of Title 28 of the United States Code. The jurisdiction of this Court over this appeal is based upon Section 1291 of Title 28 of the United States Code, and is believed to be uncontested.

B. The Parties

The Plaintiff, Dick E. Stearns, of Shreveport, Louisiana, is the inventor named in the patent in suit, and is one of the partners of the Plaintiff-Appellant, The D. E. Stearns Company, the other partner being Ellen Belson Stearns, of Whittier, California. By stipulation, the title to the patent in suit is acknowledged to reside in the partnership, together with the right to collect for all damages for past infringement (R. I, pp. 95-96).

Leo H. Tinker and John Patrick Rasor are each individuals residing in the Southern District of California, and, in 1948, originated a business dealing in holiday detectors,

which they subsequently incorporated and now carry on in the name of the Defendant-Appellee, Tinker & Rasor, a California corporation. The individuals Tinker and Rasor are the sole stockholders of the corporation and its President and Secretary-Treasurer, respectively, (R. II, pp. 399-400).

II. STATEMENT OF THE CASE

A. The Concise Abstract of the Facts

The patent involved relates to an instrument known as a "holiday detector", used to detect flaws in insulating coatings, for example, coal tar or asphalt enamel, applied to the outside of metal pipelines to protect them against corrosion. Such flaws or defects are termed "holidays". The effectiveness of the coating in preventing corrosion depends, to a large extent, upon its being impervious to ground moisture.

The pipeline industry has found such coatings to be one of the most effective methods of protecting its multi-million dollar investments in steel pipelines against corrosion. These coatings are non-conductors of electricity.

The holiday detector utilizes the insulating quality of the coating to electrically inspect it. The holiday detector is an instrument for generating high voltage (10,000 to 15,000 volts) with a means for impressing this voltage across the coating between the pipeline itself serving as one electrode and a traveling or exploring electrode. The exploring electrode is a part of the instrument and is moved progressively along the length of pipeline. If a holiday is encountered, electric current flows through the holiday between the pipe and the exploring electrode. The current flow operates a signaling system which is a part of the instrument and indicates a flaw or holiday.

Pertinent figures of the Stearns patent drawings and claims 1 and 7 are to be found in the appendix to this brief as Exhibits C, A and B respectively. For convenient comparison the drawings have been colored and the claims written in outline form with a color key added corresponding to the colors used on the drawings.

The invention of the Stearns patent is concerned with the exploring electrode and the means for propelling it and connecting it electrically into the electrical inspection circuit. It is quite well set out in this Court's first opinion, 220 F. 2d 49. This Court, in holding claims 1 and 7 patentably distinguished over the prior art, summarized Stearns' position as to the invention as follows:

" . . . They point out, as the keystone of a different cooperation of the elements, that in the new combination the coiled spring electrode is detached from any frame, is supported only by the pipe, and, most importantly, it rolls as it inspects the coated pipe. The results are, they say, that the electrode at all times completely embraces the coated pipe in operation so that no part of the coating will be skipped, the electrode is always free in operation to change its form to conform to changes in the contour of the pipe, and the electrode rolls so readily and easily that by the very nature of its movement it will not pull away from the coating." 220 F. 2d 49, at 53.

The prior opinion characterized the Stearns invention, thusly:

" . . . The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings. As we have determined, the spring electrode for the first time in its use in holiday detectors is rolled, instead of being dragged." 220 F. 2d 49, at 57.

The Stearns invention was distinguished, in the opinion, from the earlier work of Mudd and Harrell:

"... But though they were outstanding workers in the holiday detector field, they failed to solve the problem because their detectors, like all others theretofore devised, employed a frame which supported the contact elements in such manner that the frame could and did pull part of the contact elements away from the pipe coating. Stearns solved the problem, basically, by abandoning the frame and using the pipe alone to support the electrode. Stearns was an innovator, not a follower." 220 F. 2d 49, at 57.

The individual Defendants Leo H. Tinker and John Patrick Rasor initiated their holiday detector business in the spring of 1948 (R. II, pp. 466-467). These individuals formed the corporate Defendant, Tinker & Rasor, October 6, 1948 (R. II, p. 405). Prior to forming the corporation, the individual Defendants, at the request of one of Stearns' customers (R. II, pp. 404 and 475), made and sold one Model A detector and three Model B detectors. The Model A detector, which the Court held infringed claim 7 (F. of F. 14, R. IV, p. 918); had a wheelless sleeve bearing pusher that was rigidly attached to the carriage (R. II, pp. 471-472). The Model B detectors had wheeled pushers attached to the carriage, and were held to infringe claims 1 and 7 (F. of F. 14, R. IV, p. 918; R. II, pp. 473-474; Stipulation, R. I, p. 288). As to these machines, there is no issue of infringement.

The issue of infringement arises as to the detectors made, sold and leased by the corporate Defendant, Tinker & Rasor, which incorporated changes made upon advice of counsel (R. II, p. 475). One of Defendants' Model C-3 detectors was introduced by Stearns into evidence and Stearns'

case of infringement was made out as to this detector (Physical Exhibit, Plfs' Ex. 26-A, 26-B and 26-C; F. of F. 13 (a) R. IV, p. 917). As to this detector, the Trial Court said it gets "exactly the same result, rotation of the spring pushed along the pipe" (R. IV, p. 967).

An illustrative drawing of this machine is attached to the appendix of this brief as Exhibit D. For convenient comparison corresponding parts of Defendants' instrument have been colored to correspond with the color key applied to the patent drawings and breakdown of claims 1 and 7, Exhibits C, A and B, respectively, of the appendix.

Defendants' Model B machine was described in a Stipulation which constitutes nearly a word picture of the Stearns patent drawings (R. I, p. 286, and R. II, p. 298). Reference to the drawing (Exhibit D of Brief) shows Defendants, in their Model C-3, substituted the wand with the semi-sleeve wheelless bearing for the wheeled pusher of their Model B machine. The infringement issue as to claim 1 revolves about this substitution of the semi-sleeve bearing for the roller bearings of Stearns' pusher. As to claim 7, the issue revolves about the substitution of the flexible connection between the pusher and the carriage for Stearns' rigid connection.

Defendants introduced evidence of other holiday detector models made by them subsequent to the filing of the Complaint herein. Stearns contends such detectors which have the pusher and electrode of the type of Plaintiffs' Exhibit 26-A and 26-C infringe claim 1 of the Stearns patent. Mr. Razor testified all models were so equipped (R. II, p. 452). Where the models also have carriages for riding the pipe, claim 7 is urged as infringed.

Stearns' method of doing business was held to be a misuse of its patent. Stearns leases holiday detectors. Stearns

does not offer its detector for sale except in foreign commerce and it does not engage in a parts business except for repair of Stearns' holiday detectors. It is this business policy that has been held to constitute the first facet of misuse of the Stearns patent on the basis that the patent covers only part of the detector and therefore unpatented parts of it are tied-in to the patented parts in the rental of only whole detectors.

The lease agreement (Exhibit E in appendix of Brief) contains no tie-in clauses and does not require the lessee to use any Stearns detectors. The agreement merely sets out the terms of rental of such machines that are ordered by the lessee. It does not require anything of the lessee except payment of rentals and payment for unusual damage to the machine. It does not prevent the lessee from at any time purchasing, leasing or using holiday detectors of any other make, or parts thereof. In other words, there is no tie-in provision, tying the rental of Stearns' holiday detectors to any other goods or material.

The second facet of the misuse holding is concerned with Stearns' licenses. Stearns grants licenses under the Stearns patent. These were offered to Defendants (Defs.' Ex. AA and BB in appendix of Brief R. II, p. 448). The license of Exhibit AA grants the right to make and sell holiday detectors and the license of Exhibit BB grants the right to make and use or lease holiday detectors. The license, in each agreement, calls for a paid-up royalty for the life of the patent of \$250.00. Any party desiring a license may obtain a license under either or both forms.

Neither license agreement limits the licensee in any way as to the equipment or its source that may be made, used, sold

or leased under it. There is no tie-in of any material with Stearns or other requirement except to pay money royalty to Stearns and to attach a license plate to the machine used under the license as evidence of the license.

Mr. Razor testified that in the Defendant corporation's business its established rental rate for holiday detectors would return the price of the royalty in approximately one month. At that time, the royalty would then be paid up for more than eight years, or until October 19, 1960, when the Stearns patent expires (R. II, p. 466). (Razor testified in April, 1952). Mr. Razor also understood that under the terms of the license a customer of the licensee, after paying \$250.00, could use the machine for the life of the patent and "could replace the parts of that combination as many times as he wished during the life of the patent" without paying additional royalty (R. II, p. 462). The machine itself can be replaced if destroyed or worn out.

The Court held in effect that these licenses because of the quantum of the royalty had the effect of requiring the licensees to adopt and adhere to the policy of offering only complete holiday detectors to its customers, thereby restraining competition in holiday detector parts. This is the second facet of the holding of misuse (F. of F. 60, R. IV, p. 929).

B. The Issues

The issues of infringement and misuse both rest upon facts as to which there is no substantial dispute and therefore resolve themselves into questions of law to be determined by this Court.

The issues are:

1. As to claim 1:

- (a) Should the clause "*means rotatably engaging etc.*"⁴ be construed as though it had been written—rotatable means engaging etc.—and thus restricted to rollers or wheels for bearings and not be infringed by Defendants' semi-sleeve bearings?
- (b) If broad enough to cover Defendants' holiday detector, is the means clause of claim 1 indefinite under Title 35, U.S.C., Section 112?

2. As to claim 7:

- (a) Is claim 7 entitled as a matter of law to a range of equivalents to encompass Defendants' holiday detector wherein the pusher is connected to the carriage by a flexible electric conduit which permits some relative movement between the pusher and carriage, but where in use the pusher is held by the operator adjacent to the carriage and the two are pushed along the pipeline together, translating a longitudinal movement of the pusher and carriage into a rolling movement of the electrode?
- (b) Does construction of claim 7 to give it such a range of equivalents render it indefinite?

3. The question of misuse of the patent by Stearns has two facets:

⁴ ". . . and means rotably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member."

- (a) Is the inventor of a machine which is patented obligated as a matter of law to sell or to lease a skeleton made up of only the parts specifically described in the combination claim or may he legally and properly restrict his business to the lease of whole machines?
- (b) Does Stearns' licensing program constitute a misuse of the patent because the royalties are based on the right to practice the invention for the life of the patent, and
 - (1) Would the licensing program be a misuse even if its inevitable effect was to require licensees to offer only complete holiday detectors, which is not admitted but is denied?

III. SPECIFICATION OF ERRORS

A. Statement of Points on Appeal

1. The Trial Court erred in construing claim 1 of the Stearns patent 2,332,182 to be restricted in its scope by:

- (a) The wording of the claim itself,
- (b) The specification of the patent including the drawings, or
- (c) The file wrapper of the patent;

to apparatus employing wheels or rollers engaging the coiled spring electrode for rolling it and electrically connecting it to a high voltage testing circuit and to therefore not be infringed by Defendants' devices exemplified by Plaintiffs' Exhibit 26-A, 26-B and 26-C in which the pusher wand utilizes an inverted U-shaped bearing in place of wheel or

roller bearings for accomplishing said two functions; where this restricted construction was not required by the prior art and where the Court of Appeals in finding the claim patentably distinguished over the prior art did not adopt or resort to said restricted construction.

2. The Trial Court erred in the construction of claim 1 of the Stearns patent 2,332,182 in not finding, relative to Defendants' detector Plaintiffs' Exhibit 26-A, 26-B and 26-C, that Defendant' semi-sleeve type bearing (well known equivalent of the roller bearings in the Stearns Patent) fully met that portion of the claim commencing with

“ . . . and means rotatably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member.”

and thus infringes the claim under the rules of construction of means clauses in patent claims provided by Title 35, U.S.C., Section 112, which reads in part:

“An element in a claim for a combination may be *expressed as a means* or step for performing a specified function without the recital of structure, * * * and such claim *shall be construed to cover* the corresponding structure, * * * described in the specification *and equivalents thereof*.” (Emphasis added)

3. The Trial Court erred in construing the broad generic recitation in claim 1 of patent 2,332,182 of:

“Means rotatably engaging * * * with said spring * * * for rolling said spring along such elongated member”

to be restricted to wheels or rollers, thus implying the limitation of rollers recited in claims 2, 3, 4, 5, 6 and 8 and holding the claim not infringed by Defendants' detector because of this "implied" limitation.

4. The Trial Court erred in dismissing the Second Amended Complaint herein and in not holding that Defendants had infringed claim 1 of Stearns patent 2,332,182 by making, using, leasing and selling their holiday detectors which incorporate pushers and electrodes exemplified by Plaintiffs' Exhibit 26-A and 26-C, respectively.

5. The Trial Court erred in construing claim 7 as restricted by the element

"an electrode pusher and contactor carried by and electrically insulated from said platform"

to holiday detectors having a pusher arm which is a

"solid, rigid, immovable structure mechanically carried by and moving with the carriage"

so as to thereby not encompass Defendants' detector of Plaintiffs' Exhibit 26-A, 26-B and 26-C in which the wand 26-A is carried by the carriage 26-B by means of the flexible electrical cable, as the full structural and functional equivalent.

6. The Trial Court erred in not ruling that Defendants' holiday detector, Plaintiffs' Exhibit 26-A, 26-B and 26-C, is the full mechanical equivalent of the detector defined in claim 7 of Stearns patent 2,332,182 and therefore infringes said claim.

7. The Trial Court erred in its holding that claims 1 and 7 of the Stearns patent 2,332,182 are "invalid for

failure to particularly point out and distinctly claim the invention" if they are construed to cover the device manufactured by Defendant Tinker & Razor, exemplified by Plaintiffs' Exhibit 26-A, 26-B and 26-C.

8. The Trial Court erred in its holding that the Plaintiffs are not entitled to relief for the infringement of claims 1 and 7 of its patent 2,332,182 because Plaintiffs' method of doing business and/or licensing program as they relate to the patent, constituted a misuse of the patent by employing it to monopolize and to restrain competition in unpatented materials.

B. Certain of Trial Court's Findings of Fact

There is no substantial dispute between the parties as to the facts of this case, but certain conclusions are drawn in the Court's Findings of Fact which are contested and which are the basis of the Court's holding. Further, the Court erred in not comparing in its findings the Defendants' holiday detectors with the Stearns invention in determining infringement or lack of infringement. Due to their multiplicity (60 in number) the findings will be discussed in groups.

Findings of Fact Pertaining to Infringement of Claim 1:

Findings 16 to 35 (R. IV, p. 918 to p. 924) relate to this issue. The only issue is the interpretation to be given a written instrument (Stearns patent and claim 1), which is the function of the Court. Finding 20 (R. IV, p. 920) correctly states the issue to be whether the clause "and

means rotably engaging etc.”⁵ means rollers or wheels because if this language limits the claim to “rollers”, then it, of course, would not be infringed by Defendants’ holiday detector utilizing the sleeve bearing pusher.

Finding of Fact 35 (R. IV, p. 924) contains the key to the error of the Trial Court in construing “means rotably engaging” as though it had been written—rotatable means engaging—. It concludes non-infringement upon three points which are:

- A. “Pushers without wheels or rollers are disclaimed on the face of the Stearns patent”.
- B. “The Stearns patent on its face contemplates no alternative to a wheeled pusher”.
- C. “By amending claim 1 to recite a wheeled pusher Stearns disclaimed and abandoned all other structures except as set forth in claim 1”.

These conclusions are without any support either in the preceding specific findings or in the record. For example, Point A is not supported by findings such as 26 and 27 (R. IV, p. 922) which are based on a statement in the patent that “wheels 68 and 69 must rotate easily”. This doesn’t say—you must use wheels—. This is clearly no disclaimer of pushers without wheels.

Point B of finding 35 ignores the fact that both claims 1 and 7 do not recite wheels or rollers. This both contemplates and claims an alternative pusher.

⁵ “. . . and means rotably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member.”

Point C of finding 35 presupposes that "means rotatably engaging" is a recitation of a wheeled pusher and ignores the file wrapper which clearly shows the words "rotatably engaging" were added by amendment to distinguish from the prior art of Clarvoe, Dye, Bensett and Lenz by specifying that the spring electrode was free to rotate.

Thus, the Conclusions of Law IV, V, VI, and X are not supported by proper findings of fact and are based upon improper construction of written instruments (Conclusions, R. IV, p. 930).

*Findings of Fact Pertaining to
Indefiniteness of Claim 1:*

Findings 36 and 37 (R. IV, p. 924) in effect legally conclude that if the words "means rotatably engaging" are broad enough to include bearings other than wheels or rollers it is invalid as failing to "particularly point out and distinctly claim the invention". As a matter of law, this is contrary to the statutory construction to be given a means clause.⁶ The sleeve bearing of Defendants is the full equivalent of the roller bearings of the Stearns patent drawings.

Thus, Conclusions of Law VII and X are not supported by fact or law (R. IV, p. 931).

Findings of Fact Pertaining to Claim 7:

These include Findings 38 through 45, inclusive (R. IV, pp. 925 to 926). The finding of non-infringement is based

⁶ Title 35, U.S.C., Section 112:

"An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof."

upon the conclusion of Finding 43 (R. IV, p. 926), wherein the Court concludes Defendants' holiday detectors "do not do the same work in substantially the same way and do not accomplish the same result", and therefore are not the equivalent of the pusher and carriage of claim 7. There are no findings of any *facts* of difference in the work, the manner of its performance, or the result. Certain findings relating to the difference in the mechanical form of the connections in Defendants' and Stearns' holiday detectors in nowise support the conclusion that Defendants' detectors "do not do the same work in substantially the same way and do not accomplish the same result".

Thus, Conclusions of Law IV, V, VI and X, as applicable to claim 7, are contrary to law and fact (R. IV, p. 930).

*Findings Pertaining to Indefiniteness
of Claim 7:*

Finding 45 (R. IV, p. 926) concludes that if claim 7 is construed broadly enough to cover Defendants' detector (Plaintiffs Exhibit 26-A, 26-B and 26-C) it is invalid as failing to particularly point out and distinctly claim the invention "because it would cover something not disclosed or taught". The conclusion gives *no* range of equivalency to the claim whereas the invention, as determined by the Court of Appeals on the first appeal is entitled to a broad range of equivalency from the standpoint of rolling the electrode while connecting it electrically to the high voltage circuit. 35 U.S.C. 112.

Thus, Conclusions of Law VII and X, as applied to claim 7, are contrary to law and fact (R. IV, p. 931).

*Findings Regarding Misuse (46 to 60, inclusive,
R. IV, pp. 926 to 929)*

The Stearns "product" is correctly set out in Finding 46 (R. IV, p. 926) to be a "holiday detector". The holding of misuse is predicated upon Stearns' refusal to enter into a parts business selling only the skeleton made up of the carriage, pusher and electrode of this product separately from the remainder of the "holiday detector" (F. of F. 51, 53 and 54, R. IV, p. 926). There is no finding of any tie-in of any materials in Stearns' leasing policy, however, the leasing of complete holiday detectors is erroneously labeled a tie-in of the parts of the whole. No case has ever held this and there are several cases to the contrary. Such a doctrine, if it is allowed to become law in this Circuit, will render illegal substantially all of the manufacturing business conducted in the Circuit.

Stearns' leasing of whole detectors is not a "refusal" to sell parts where there is no evidence of a market for a carriage, pusher and electrode skeleton without the electrical apparatus.

Another facet of the holding of misuse is based on Stearns' licensing program interpreting the paid-up royalty for the life of the patent as being a royalty on the sale or lease of each machine, contrary to the plain wording of the licenses (F. of F. 57 to 60, inclusive, R. IV, p. 929; Defs'. Ex. AA and BB in appendix of Brief), and Rasor's testimony of his understanding of the licensing program (Rasor, R. II, p. 458 to p. 466). As a matter of law, it would not be misuse even if licensees were driven to sell or lease only complete holiday detectors. A license can legally be limited to a partial use, but Stearns' are not.

There is no evidence that such is the "inevitable" effect of Stearns' licenses.

Thus, Conclusions of Law III and X are not supported by law or fact (R. IV, p. 930).

SUMMARY OF ARGUMENT

This case presents the grossly unfair picture of an outstandingly ingenious, successful inventor, who has been adjudicated by the Court of Appeals to be an innovator not a follower, but whose patent on remand has been "so precisely read, the range of equivalence so narrowly confined, that piracy is rewarded for the cunningness of its dissimulation and the patentee is robbed of the fruits of his invention".⁷

The Issue Of Infringement Resolves Itself To a Question Of Law, There Being No Material Facts In Dispute

In this Circuit, the law is well established that where, as here, there is no material fact at issue, the question of infringement resolves itself into a matter of law for examination by the Court of Appeals. The construction of claims 1 and 7 and the comparison of the claims with Defendants' structure is all that is involved.

Stuart Oxygen Co., Ltd. v. Josephian, 162 F. 2d 857, 859;

Kemart Corp. v. Printing Arts Research Laboratories, Inc., 201 F. 2d 624, 627;

Kwikset Locks, Inc. v. Hillgren, 210 F. 2d 483, at 488, 489; Cert. Denied, 348 U.S. 855; 99 L. Ed. 673;

Sanitary Refrigerator Co. v. Alexander F. Winters, 280 U.S. 30, 36; 74 L. Ed. 147, 153;

⁷ Quote from Judge Hutcheson's opinion in *Matthews v. Koolvent Metal Awning Co.*, 158 F. 2d 37, at 38, C.A. 5, 1946.

United States v. Robert Esnault-Pelterie, 303 U.S. 26, 30; 82 L. Ed. 625, 629.

(This section is fully treated in summary and will not be discussed in main argument.)

Claim 1 Is Infringed Because Defendant's Holiday Detector Meets The Two Criteria Of Infringement:

- 1) The Invention Has Been Appropriated, And
- 2) The Claim Language Reads Directly On Defendants' Detectors

The Trial Court made no formal finding of fact comparing the Defendants' holiday detector with the invention as determined by the Court of Appeals. However, at the hearing on remand, the Trial Judge's comments characterized Defendants' holiday detector as "fundamentally a copy" of the Stearns device (R. IV, p. 958). A mere visual comparison of Exhibit D, attached to this brief, with the drawings of the patent in suit (Exhibit C) illustrates the correctness of the Trial Court's characterization and the completeness of Defendants' appropriation of the Stearns' invention. Such differences as do exist between Stearns' and Defendants' detectors having for their only purpose a technical avoidance of infringement, adopted upon advice of counsel (R. II, p. 475).

As written in the claim, "rotatably" modifies "engaging", but as construed by the Trial Court it modifies "means". This rewriting of the claim is not warranted as a matter of law and it is contrary to the patent specification; the intent of the Patent Office and the patentee as reflected in the file wrapper; and Stearns' knowledge as shown by his early experiment that a wheeled pusher was not an essential of the invention.

A Means Plus A Function In A Patent Claim, By Statute, Is To Be Construed As Covering The Structure Shown In The Patent And The "*Equivalent Thereof*"; The Trial Court Failed To Follow This Rule Of Construction In Holding Claim 1 Indefinite If Broad Enough To Cover Defendants' Holiday Detector

Congress has specifically authorized the statement of an element in a claim by means followed by the function to be performed "without the recital of structure", 35 U.S.C. 112. Congress likewise specified in this statute the rule for construing such claims. Under this statute there is no place for a ruling that claim 1 is indefinite if broad enough to cover Defendants' detectors, because there is no "recital of structure" (F. of F. 36, R. IV, p. 924). The only question under the statute is the equivalency of roller bearings and a sleeve bearing on the pusher. Roller bearings and sleeve bearings are notoriously known to be full equivalents. There is no finding of fact to the contrary.

Claim 7 Is Admitted Not To Be Restricted To A Wheeled Roller (Finding of Infringement By Model A) And The Substitution Of A Flexible Wire Connection Between The Pusher Bearing And Carriage Does Not Avoid Infringement On The Basis Of Full Mechanical Equivalence -

- A. The Claim Is Entitled To A Broad Range Of Equivalence Commensurate With Its Pioneer Status In The Art**
- B. Application Of Rule Of Equivalence Does Not Make Claim Indefinite**

The doctrine of equivalents has come into the patent law to prevent the unjust usurpation of the true invention of a patent by a ruse of substitution of one element for

another which does not change the basic mode of operation and the results obtained.

The Stearns invention has been adjudicated by the Court of Appeals to be an outstanding development in the holiday detector field and one wherein the inventor was an innovator and not a follower.

This generic invention is entitled to a broad range of equivalents to embrace Defendants' Model C-3 detector where the flexible cable connecting the pusher and carriage doesn't substantially change the operation of the device. The carriage and pusher are still propelled down the pipe with a longitudinal movement that is translated into a rolling movement of the electrode. The means, the function and the result are substantially the same.

It Is Not A Misuse Of The Patent For Stearns To Lease Only Whole Holiday Detectors And Not Engage In A Parts Business

Stearns' business of leasing only whole machines and making parts available only for the repair of its machines is not a misuse of its patent. It would not be even if Stearns *refused* to lease the carriage, pusher and electrode without the remainder of the electrical apparatus. The courts have refuted this exact contention of a basis for misuse. However, Stearns denies having ever made such refusal.

Stearns' lease contains no tie-in clause and the Trial Court made no finding of an illegal tie-in of the usual or classical sense. It was a legal misnomer for the Trial Court to call the lease of whole machines a "tie-in" of the parts of the whole. It has no basis in logic or law.

There Is No Evidence To Support The Conclusion That Stearns Refuses To Make Available Its Electrode, Pusher And Carriage Except As A Complete Holiday Detector

Defendants wholly failed to prove Stearns refused to make available its electrode-pusher-carriage combination without the electrical apparatus. While Stearns admitted he didn't sell parts except for his own machines, there is no evidence of the existence of a commercial demand for parts for machines of other manufacturers. There is no evidence that Stearns ever refused to sell the electrode-pusher-carriage combination or that anyone ever offered to buy one.

The parts list of Defendants for each of its models and visual inspection of the holiday detectors, which are physical exhibits, demonstrate the special design of the parts for holiday detectors of different types. Even in Defendants' own operations, its several models each have their own parts designations and requirements.

A Refusal To Do Business Is Not A Tie-In In The Legal Sense That Has Been Condemned By The Courts. Instead, The Courts Have Condemned The Doing Of Business Upon A Tie-In Basis

It is not admitted that Stearns has refused to sell holiday detector parts but even if this were true, the Courts have not held it an improper restraint on trade for a party to refuse to do business but rather have held that the illegal practice is *the doing of business* upon the extraction of the agreement not to use equipment or supplies of others.

Stearns' Licensing Program, In Exacting A Royalty Of \$250.00 For The Practice Of The Invention For Eight Years, Is Both Reasonable And Legal

The only thing that the Trial Court found wrong with Stearns' licensing program was that the paid-up royalty of

\$250.00 for the operation of one holiday detector for the life of the patent was too high. The illegality of the too high royalty is said to be that it would drive licensees to deal only in whole holiday detectors (F. of F. 60, R. IV, p. 929). A patentee has the right to grant licenses upon any reasonable basis and the payment of money only, regardless of how high, has never been held unreasonable. Certainly \$31.25 per year, for the practice of an invention as valuable as Stearns', is not unreasonable. (The patent had over eight years to run at the time of the trial.)

Instead of unlawfully restraining trade, this licensing program constitutes a relinquishment of a part of Stearns' rights under the patent upon a most reasonable basis.

ARGUMENT

A. Claim 1 Is Infringed Because Defendants' Holiday Detector Meets The Two Criteria Of Infringement:

- 1) The Invention Has Been Appropriated, And
- 2) The Claim Language Reads Directly On Defendants' Detectors

The issue of infringement of claim 1 revolves about the interpretation to be given to the words "means rotatably engaging" and the correctness of the Trial Court's construction of this phrase as if it had been written—rotatable means engaging—, so that "rotatably" modifies "means" instead of "engaging" as it appears in the claim.

It is axiomatic in patent law that to determine infringement the *invention* must be looked to and the alleged infringing device compared with the *invention*. This is true because a claim must be construed so as to give meaning to the actual invention or advance in the art.

Topliff v. Topliff, 145 U.S. 156; 36 L. Ed. 658, 664;
Bianchi et al. v. Barili, C. A. 9, 1948, 168 F. 2d 793, 799;
Stuart Oxygen Co., Ltd. v. Josephian, C. A. 9, 1947,
 162 F. 2d 857, 861;
*Kemart Corp. v. Printing Arts Research Laboratories,
 Inc.*, C. A. 9, 1953, 201 F. 2d 624, 629;
Ry-Lock Company, Ltd. v. Sears, Roebuck & Co.,
 C. A. 9, 1955, 227 F. 2d 615, 618; Cert. Denied,
 350 U.S. 987; 100 L. Ed. 353.

The District Court in its 60 findings of fact made no comparison of the invention of the Stearns patent with Defendants' holiday detectors. In fact, the sole finding of fact dealing with the invention in anywise is finding of fact 12, (R. IV, p. 917) which reads:

"There is invention in the device of the Stearns patent."

When the Stearns invention, as determined by this Court on the first appeal, is compared with the Defendants' holiday detector, it is immediately apparent that the invention has been fully appropriated (Plfs'. Physical Ex. 26-A, 26-B and 26-C; Drawing Exhibit D in the appendix of this brief).

This Court stated in the opinion on the first appeal (at page 57 of 220 F. 2d):

" . . . The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings. As we have determined, the spring electrode for the first time in its use in holiday detectors is rolled, instead of being dragged."

Defendants have not contended that their spring doesn't roll and, to the contrary, their expert witness Peterson

frankly described the action of the spring electrode as "The spring element rolls along the pipe" (R. II, p. 544).

The District Judge at the hearing on remand characterized Defendants' detector as "fundamentally a copy" of Stearns: (R. IV, p. 958)

"Mr. Gregg: The question is, what was the invention.

"The Court: Well, it doesn't make any difference what the invention was if you have copied it. It seems to me that here is fundamentally a copy."

The District Judge compared the difference in *form* between Defendants' and Stearns' detectors and pointed out to Defendants' counsel that they get exactly the same result "rotation of the spring pushed along the pipe" (R. IV, p. 967):

"... The defendants have come around and used the same thing. They have made one change. That is, instead of having the pusher attached permanently to the carriage and attached by means of wheels underneath the tongue, the defendants have used a rod which is connected with the pusher by a wire, and instead of using wheels, they have used a flat surface. *They get exactly the same result, rotation of the spring pushed along the pipe.*"

The invention as determined on the first appeal did not turn on the presence of "wheels" or "rollers" on the pusher. The construction the Trial Court placed upon the phrase "means rotatably engaging" as though it had been written—rotatable means—is not supported by the opinion of this Court on the first appeal in determining invention and is inconsistent with its own characterization of Defendants' detector as "fundamentally as copy" of Stearns'. The Dis-

strict Court erred in not comparing the Defendants' holiday detector with the invention and finding infringement as a matter of law because it "is fundamentally a copy". The wand with its sleeve bearing is obviously a means. It in fact engages the spring electrode to roll it so the engagement is—rotatable—. It gets "exactly the same result, rotation of the spring pushed along the pipe" (Trial Court, R. IV, p. 967). There is no dispute for the frank testimony of Defendants' expert Peterson fully compares the rotatable engagement of Defendants' sleeve bearing with the spring to that of the Stearns pusher and spring. He was in full agreement that in each case the translation of the longitudinal movement of the pusher to the rolling movement of the spring takes place through their respective engagements (R. II, pp. 544 and 545).

*The Language Of Claim 1 Is Generic—
It Is The Function Of The Claims To Measure
The Invention*

It is the established rule of law in determining infringement that the function of the claims is to measure the bounds of the invention and to delineate the scope of the protection of the patent. The patent is not to be limited to the preferred embodiment that the statute required Stearns to show in the patent drawings (Revised Statute 4888). *Continental Paper Bag Co. v. Eastern Paper Bag Company*, 210 U.S. 405, 418; 52 L. Ed. 1122, 1128. The following quotation from the *Continental Paper Bag* case appears in *Stuart Oxygen Co., Ltd. v. Josephian*, C. A. 9, 162 F. 2d 857, at 861:

"An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth.

'The principle of the invention is a unit, and invariable; the modes of its embodiment in the concrete invention may be numerous and in appearance very different from each other'. 2 Robinson, Patents Sec. 485."

Claim 1, construed in accordance with this rule, cannot have its broad recitation of "means rotatable engaging" narrowed to encompass only wheeled pushers.

The narrow construction applied by the Trial Court was not based on the prior art, but rather upon a highly technical reasoning that the patent specification and file wrapper estoppel disclaim wheelless pushers. These must be looked to, to weigh the correctness of the Court's construction.

Contrary to the Court's finding that the patent specification does not contemplate a different structure than that shown in the patent drawings, claim 1 itself, which by law controls, is broader than a wheeled pusher and contrasts with claims 2 to 6, inclusive, and 8, which recite rollers. It clearly contemplates the inclusion of a pusher means which "rotatably" engages the spring to form a movable electrical contact and to roll the spring along the pipe.

The Patent Specification Contains No Disclaimer Of Wheelless Pushers

The patent drawings show only the preferred pusher with wheels. However, the specification emphasizes that the drawings of the patent are illustrative only and show only "certain embodiments of the invention" when it stated:

"Other objects and advantages of this invention will become apparent from the following description taken in connection with the accompanying drawings, wherein are set forth by way of illustration and ex-

ample certain embodiments of this invention." (Pg. 1, Col. 2, of Stearns patent, lines 14-19, R. III, p. 758)

One of the very objects of the invention is stated to be the provision of a "novel means", not—a wheeled pusher—. The object reads:

"Another object is to provide a novel means for moving such electrode along the pipeline." (Pg. 1, Col. 2, lines 12 and 13, Stearns patent, R. III, p. 758).

In addition, the specification describes the pushers shown in the drawings broadly, as a "means", when it states:

". . . which has means for providing electrical contact with and propelling the exploring electrode as will be presently described." (Pg. 2, Col. 2, lines 1-4, Stearns patent, R. III, p. 759).

The above excerpts give a broad characterization of the invention. They appear in the patent specification in the explanation of the *principle* and *are consonant with* the generic recitation of claim 1. These excerpts precede the detailed description of the particular embodiments of the pusher shown in the drawings, upon which the Trial Court based its construction of a disclaimer of all but wheeled pushers.

The Trial Court's construction is not based *on the four corners* of the patent but rather is predicated upon a few words of one paragraph describing Fig. 15 of the drawings (F. of. F. 25, 26 and 27, R. IV, p. 922). Reference to the entire paragraph shows that the patentee was only complying with the statute which requires an exact description

of the preferred form of the invention.⁸ The paragraph, with the language of the Trial Court's findings of fact italicized, reads:

"It has been found that under many circumstances, the use of wheels 46 and 47 is unnecessary and under such circumstances these are omitted as shown in Fig. 15. In this figure, the brackets 66 and 67, which correspond to the brackets 38 and 39, are not provided with a means for mounting wheels such as 46 and 47. They are provided, however, with mountings for wheels 68 and 69, corresponding to the wheels 44 and 45, which wheels are adapted to engage on opposite sides of the electrode 56 and provide electrical contact therewith, as well as to move said electrode along the pipe. When the wheels 46 and 47 are employed, it will be seen that they tend to rotate the wheels 44 and 45 and that rotation of these wheels is transmitted by friction to the electrode 56 tending to rotate the same as well as to push it forward. Where the wheels 46 and 47 are not employed, as in Fig. 15, the knurling 55 may be omitted so that the wheels 68 and 69 might be perfectly smooth if desired. *Wheels 68 and 69 must rotate easily to cause proper propulsion of the electrode while permitting it to rotate.*" (Pg. 3, Col. 1, lines 4-27 of Stearns patent, R. III, p. 760).

⁸ "Before any inventor * * * shall receive a patent * * * he * * * shall file in the Patent Office a written description of the same, * * * in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it pertains * * * to make, construct, compound, and use the same; and in the case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle * * *; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. * * *".

The italicized portion is manifestly no disclaimer. Further, it does not state that—wheels must be used—. Instead it states that where used they “must rotate easily”. The holding of disclaimer is another instance of rewriting the language of the patent to suit the Defendants’ purpose.

For this language to disclaim all but wheeled pushers would be a variance from the language of claim 1 and a forfeiture. Equity abhors a forfeiture and the obscure recitation of the operation of wheels 68 and 69 cannot assume the importance of a disclaimer to limit the generic recitation of claim 1, whose statutory function it is to limit the invention. To place such emphasis upon this statement is outside any established rule of construction of any written instrument.

The Broad Language of a Generic Claim Should Not Be Construed to Include the Limitation of a More Specific Claim

To rewrite the claim language to change “means rotatably engaging” to—rotatably means engaging—ignores the fact that claim 1 differs in scope from claim 2 of the patent substantially only in that claim 2 is specific to rollers where claim 1 calls for “means rotatably enaging”. It is the established rule of construction that a specific limitation of one claim cannot be implied to the broader language of a generic claim.

Great Lakes Equipment Company v. Fluid Systems, Inc., C. A. 6, 1954, 217 F. 2d 613, at 616;
Kemart Corp. v. Printing Arts Research Laboratories, Inc., C. A. 9, 1953, 201 F. 2d 624, at 633;
Baker-Cammack Hosiery Mills, Inc. v. Davis Co., C. A.

4, 1950, 181 F. 2d 550; Cert. Denied, 340 U.S. 824;
95 L. Ed. 605;

Kennedy et al. v. Trimble Nurseryland Furniture, Inc., C. A. 2, 1938, 99 F. 2d 786, 788;

Whitaker v. Todd, C.A. 3, 1916, 232 F. 714.

This universal rule of construction is clearly stated by the Second Circuit in *Kennedy et al. v. Trimble Nurseryland Furniture, Inc.*, C. A. 2, 1938, 99 F. 2d 786, 788, wherein it stated:

“ * * * We have said that a court ‘should never interpret a positively recited generic expression as limited to the precise instrumentality disclosed by the patent, except where such narrow interpretation is necessary to distinguish the claim from the prior art.’ *International Banding Machine Co. v. American Bander Co.*, 2 Cir., 9 F. 2d 606, 608. Where a patent contains both a broad and a narrow claim and the suit is brought on the broad claim, the court will not read into the broad claim a limitation not therein expressed but which is expressed in the narrower claim; to do so would be changing the contract between the public and the patentee.”

*The File Wrapper Discloses The Plain Intent Of
The Patent Office And Stearns To Be That Claim 1
Is Generic And Not Limited To Wheeled Pushers*

The file wrapper of the prosecution of the Stearns application which became the Stearns patent in suit shows that the phrase “means rotatably engaging” in claim 1 is entitled to its fullest generic meaning. Original claim 3 of the application became claim 1 of the patent (File Wrapper, Defs’. Physical Ex. L).

To obtain allowance of the claim, Stearns amended it to emphasize the rolling character of the spring electrode. The remarks of counsel accompanying the amendment pointed out that the amendment made it clear the spring was free to rotate and roll whereas in the prior patents the spring electrodes were held against such rotation. With this amendment and explanation, claim 1 of the patent was allowed. This is in accord with the generic meaning of the claim that "rotatably" modifies "engaging" and not "means".

The amendment was the addition of "rotatably engaging and" and also "and for rolling said spring along such elongated member." The remarks of the attorney are:

"Claim 3 has been amended to specify that the means forming the movable electrical contact with the spring rotatably engages the spring and rolls the spring along the the elongated member which is being tested. It is pointed out that in neither of the patents to Lenz, Dye, or Bensett is the coiled member capable of rotation along the member which is to be tested and in no case is it mounted so that it could be rotated or rolled along such member. In each case, the means which engages the coiled member would hold it against any substantial rotation. It is, therefore, respectfully submitted that claim 3 should be allowed over the patent to Clarvoe, taken with the three patents above referred to." (Pgs. 25 and 26 of File Wrapper, Physical Exhibit, Defs'. Ex. L).

The rule is that the argument of counsel in the file wrapper of a patent "can be used to affirm a construction, *permissible by the wording of the claims*, as according with the intentions of the inventor and the Patent Office" (emphasis ours). *Cutter Laboratories, Inc. v. Lyophile-Cryochem Corporation et al.*, C. A. 9, (1949), 179 F. 2d 80, 87.

This argument in the file wrapper and the fact that "rotatably" modifies "engaging" instead of "means", leaves no doubt as to Stearns' and the Patent Office examiner's intention that claim 1 of the patent was restricted *only* to an engagement which permitted the spring electrode to roll, while electrically energized. That is what the claim says, that is what was intended, that was the novel concept determined on the first appeal, and that is what Defendants' structure does.

*Stearns' Early Experiments With A Block Pusher
Are Indicative Of The Breadth Of The Invention
As Including Non-Wheeled Pushers*

Stearns' first experiments in rolling a coiled spring electrode were made with a wheelless pusher having stationary bearings for "rotatably engaging" the electrode. A drawing of this is to be found in the record, Volume III, page 762, as Defendants' Exhibit B. This pusher was devised by Stearns several months prior to the filing of his patent application. It fully demonstrated the rolling coiled spring electrode principle of the Stearns invention.

Both Stearns and W. A. Nowlin testified as to these first experiments. Nowlin was the machinist who made the spring end connectors and the pusher block for Stearns (Nowlin, R. I, p. 214-215; Stearns, R. I, p. 89-90).

Stearns testified that while the block type pusher would be suitable for operation where the pusher is held by hand that he preferred an integrated machine in which the pusher is mounted on the wheeled carriage as a part thereof and for this integrated machine, the block pusher was not as satisfactory as the wheeled pusher which he developed.

This preferred embodiment is what he showed in his patent drawings and has continued to use as his commercial machine. Stearns testified as follows:

"Q. Was such a device made?

A. Yes. Mr. Nowlin made the pusher for me and then he fashioned (typographical error corrected) two parts, each of which fitted into the opposite ends of the spring and screwed into the wires on the end.

Q. What did you do with that?

A. Well, we finished it up rather late and took it down to the pipe yard there at the Latex Station, put it on the pipe, snapped the spring onto the pipe and connected the spring together at its ends and I took the pusher and held it in my hand and put it down over the top of the spring, held my breath, and pushed on it and the spring rolled, and we rolled it up and down the pipe for quite a while.

Q. What did you do when you pushed on it for quite a while and it rolled, the spring?

A. I observed the action of the spring, the action of the connector and looked underneath to see what was going on at the bottom of the pipe, looked at the sides and noted whether or not the spring followed along together and whether there was any slipping, any slipping motion, and I particularly noted that, with the hand pusher block down over the top of the spring, that each time you reversed direction of the spring, that is going from forward to backward motion, that there was a break in contact between the spring and one of the metal contacts on either side, whichever it might be, and then decided that there would have to be some means of articulation furnished.

If you are going to fasten a pusher onto a carriage frame and make it as an integrated holiday

detector, that was important, because in changing the direction, the breaking was made between the electrode and the pusher contact that would cause a spark to occur and get a registration of the light and bell signal which would be false.

Q. Would that be true if the device was to be used, not as an integral part of the machine, but as a separate pusher?

A. Well, there would probably be enough misalignment on the pusher so that where the body furnishes articulating means of connecting to it, that it wouldn't break.

Q. By 'body' you mean the body of what?

A. I mean the body of an individual handling it, the human being. But in a device where the pusher was fastened on to the carriage, there had to be some means of articulation between the electrical and mechanical contact of the electrode so that when you reversed direction there would be no break in contact between the pushing element and the controlling electrode, and so that when the carriage tipped up and down over irregularities in the surface of the pipe, that they would not bind on the top of the electrode." (Quotes from Pgs. 89 and 90, R. I)

It is apparent that the breadth of claim 1 as worded is consistent with Stearns' knowledge of the invention and his first development of a pusher having stationary bearings for rotatably engaging the spring electrode to roll it down a pipeline. He then developed the preferred pusher having the wheels as called for in other claims of the patent such as claims 2, 3, 4, 5, 6 and 8. The fact that Stearns immediately went on to develop his preferred wheeled pusher does not limit the broad claim beyond the wording of the claim.

A Means Plus A Function In A Patent Claim, By Statute, Is To Be Construed As Covering The Structure Shown In The Patent And The "Equivalent Thereof"; The Trial Court Failed To Follow This Rule Of Construction In Holding Claim 1 Indefinite If Broad Enough To Cover Defendants' Holiday Detector

The interpretation or construction to be given claim 1 is specified by statute, 35 U.S.C. 112. This statute also states that the means clause is to be construed as covering the structure shown in the patent and "equivalents thereof". The Trial Court did not follow this prescribed statutory construction in holding that claim 1 was indefinite if broad enough to cover Defendants' holiday detector (F. of F. 36 and 37; R. IV, p. 924). The pertinent portion of the statute is as follows:

"An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, * * * in support thereof, and *such claim shall be construed to cover* the corresponding structure, * * * described in the specification *and equivalents thereof*." (Emphasis ours)

Under this rule of construction, there is no place for a holding of indefiniteness because of a failure to recite structure. The only question to be determined is that of the equivalency of roller bearings and a sleeve bearing on the pusher. This equivalence is so well established that Defendants did not even request a finding of non-equivalence and the Court made none. Roller bearings and sleeve bearings are notoriously known to be full equivalents—the two do the same work in the holiday detectors of the patent and of Defendants, in that they both rotatably engage the spring so as to roll it along the pipe while establishing elec-

trical connection between the spring and the high voltage unit.

Claim 7 Is Admitted Not To Be Restricted To A Wheeled Roller (Finding of Infringement by Model A) And The Substitution Of A Flexible Wire Connection Between The Pusher Bearing And The Carriage Does Not Avoid Infringement On The Basis Of Full Mechanical Equivalence

The doctrine of equivalents has come into the patent law to prevent the unjust usurpation of the true invention of a patent by a ruse of substitution of one equivalent element for another, which does not change the basic mode of operation or the results obtained. It has for its purpose to prevent infringement upon the rights of the patentee by just the ruse here adopted wherein the alleged infringing machine does the same thing in substantially the same way, using substantially the same or equivalent means.

In comparing Defendants' holiday detector with claim 7, it is readily apparent that the flexible connection of the pusher with the carriage allows some relative movement of the carriage and pusher without producing a rolling of the electrode. However, it is equally apparent that in the practical use of the device in the field it is moved along a pipeline as a unit, the operator rolling the carriage and holding the wand in close proximity. As the unit is rolled along, the electrode is pushed in a rolling movement. If this unitary relationship of the pusher and carriage is disrupted, the device cannot serve as a holiday detector. The doctrine of equivalents has been evolved by our courts to protect against just this type of utilization of the invention.

Graver Tank Co. v. Linde Air Products Co., 339 U.S. 605, 607; 94 L. Ed. 1097-1101;

Ry-Lock Company, Ltd. v. Sears, Roebuck & Co.,
C.A. 9, 1955, 227 F. 2d 615, 618; Cert. Denied,
350 U.S. 987; 100 L. Ed. 353;

*Cutter Laboratories, Inc. v. Lyophile-Cryochem Cor-
poration, et al.*, C.A. 9, 1949, 179 F. 2d 80, 89;

Bianchi, et al. v. Barili, C.A. 9 (1948), 168 F. 2d 793,
800.

The *Graver Tank* case stated (U. S. report, page 607;
L. Ed. report, page 1101):

" . . . If accused matter falls clearly within the claim,
infringement is made out and that is the end of it.

"But courts have also recognized that to permit imi-
tation of a patented invention which does not copy
every literal detail would be to convert the protection
of the patent grant into a hollow and useless thing.
Such a limitation would leave room for—indeed en-
courage—the unscrupulous copyist to make unim-
portant and insubstantial changes and substitutions in
the patent which, though adding nothing, would be
enough to take the copied matter outside the claim,
and hence outside the reach of law. One who seeks to
pirate an invention, like one who seeks to pirate a
copyrighted book or play, may be expected to intro-
duce minor variations to conceal and shelter the piracy.
Outright and forthright duplication is a dull and very
rare type of infringement. To prohibit no other would
place the inventor at the mercy of verbalism and
would be subordinating substance to form. It would
deprive him of the benefit of his invention and would
foster concealment rather than disclosure of inventions,
which is one of the primary purposes of the patent
system."

* * *

"What constitutes equivalency must be determined
against the context of the patent, the prior art, and
the particular circumstances of the case. Equivalence,
in the patent law, is not the prisoner of a formula

and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalents things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalents."

The Trial Court in considering claim 7 in Finding No. 43 (R. IV, p. 926) found as a conclusion that Defendants' Model C-3 detectors were not the equivalent of the pusher and carriage of claim 7 "because they do not do the same work in substantially the same way and do not accomplish the same result". This finding or conclusion is not supported by any finding as to *facts* and is diametrically opposed to the Trial Court's numerous comments made at the hearing on remand. The Trial Court there had before him the physical exhibit of Defendants' Model C-3 detector and the Trial Court's comments lay at rest any doubts as to the fundamental equivalency of Defendants' detector and the patent claim 7. At page 958 of Volume IV of the record, the Court states:

"The Court: Well, it doesn't make any difference what the invention was if you have copied it. It seems to me that here is fundamentally a copy."

At page 967 of Volume IV of the record the Court stated:

"The Court: What you have done here is the plaintiff * * * created their device. The defendants have come around and used the same thing. They have made one change. That is, instead of having the pusher attached permanently to the carriage and attached by means of wheels underneath the tongue, the defendants have used a rod which is connected with the pusher by a wire, and instead of using wheels, they have used a flat surface. *They get ex-*

actly the same result, rotation of the spring pushed along the pipe." (Emphasis ours)

Again, the Court stated at page 954 of Volume IV of the record:

"The Court: The only difference here is that the rolling movement of the spring is caused in the Stearns apparatus by the moving of the carriage, and in the defendant's apparatus by the moving of the arm. Now, that is the only difference there is, absolutely all.

Mr. Gregg: Your Honor, we think the record shows conclusively and convincingly that Stearns regarded—

The Court: I don't care what the record shows. I have got the two apparatuses in front of me. They are exhibits. I can see what they do."

Claim 7 Is Entitled To Broad Range Of Equivalence

The pioneer status of the Stearns invention, where Stearns was an "innovator" by abandoning a frame for the electrode connected so as to pull it from the pipe coating and the first to "roll" the electrode, entitles the claim to a broad range of equivalence.

Hildreth v. Mastoras, 257 U.S. 27 at 36; 66 L. Ed. 112 at 117;

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405; 52 L. Ed. 1122;

Miller v. Eagle Mfg. Co., 151 U.S. 186, 207; 38 L. Ed. 121, 131;

Morley Sewing Machine Co., et al. v. Lancaster, 129 U.S. 263, 273; 32 L. Ed. 715, 719.

Application Of Rule Of Equivalence Does Not Render Claim Indefinite

That such a claim is not rendered indefinite just because it is given the range of equivalence commensurate with its status in the art of holiday detection is so basic as to require no citation of authority. The ruling of indefiniteness has no factual, legal or logical basis.

The claim is clearly entitled to encompass a holiday detector having a carriage with a pusher carried thereby in any manner so as to propel the spring electrode in a rolling movement. The translation of the longitudinal movement of the carriage and pusher to the rolling movement of the electrode is the novel concept of this claim and is accomplished by Defendants' instrument.

It Is Not A Misuse Of The Patent For Stearns To Lease Only Whole Holiday Detectors And Not Engage In A Parts Business

For the purpose of argument, it will be assumed that Stearns refused to lease the carriage, electrode and pusher of its detectors without the electrical components, but under a later heading it is emphasized Stearns has never refused to lease or sell these parts and there is no evidence of such refusal.

It is important to note at the outset that Stearns' lease agreement contains no tie-in clause. It requires payment of rental only for periods of actual use of Stearns' machines and does not exact as a condition of lease the purchase or lease of any other material or any number of machines.

The contention that it is a misuse of a patent for a combination for the patent owner to sell only whole systems and to refuse to sell or lease a skeleton made up of only the

elements specifically recited in the claims has been turned down by the courts.

Electric Pipe Line, Inc. v. Fluid Systems, Inc., C.A. 2, 1956, 231 F. 2d 370;

Great Lakes Equipment Co. v. Fluid Systems, Inc., C.A. 6, 1954, 217 F. 2d 613 at 619;

Vulcan v. Maytag, C.A. 8, 1934, 73 F. 2d 136, 139.

In the *Electric Pipe Line* case, the Court stated at page 372:

"Plaintiff's complaint, * * * is that defendant will not sell these component parts, which are designed and manufactured according to defendant's specifications, except in connection with defendant's 'Lines Thermal Electric System'. The question thus arises whether it is a misuse of the monopoly conferred by the Lines combination patent for defendant to insist that its oil transportation system only be used where the unpatented component parts are procured from it."⁹

* * *

"In this case, the sale of unpatented components is incidental to the sale of the system as a whole, even though Fluid's revenue is derived from the sale of the components. Where the owner of a combination patent designs the installation and guarantees its performance, it is not an unreasonable use of the patent to insist that the components of the patented system be obtained from it. See *Great Lakes Equipment Co. v. Fluid Systems, Inc.* supra, 217 F. (2) at p. 619."

If the ruling of misuse by the Trial Court is allowed to stand in this Circuit, the ultimate consequences will be that no industry having a patented article of manufacture will be able to continue its business without offering for sale

⁹ "These components include electrical transformers, thermostats, tank heaters, fuel oil heaters, panel boxes, insulated couplings and insulated flanges.", page 371.

a skeleton device made up of only exactly those elements specifically recited in the patent claim. Patented lawnmowers would have to be sold without handles and wheels, patented light bulbs without the male part to screw into the socket or perhaps the glass envelope, patented shoes without the shoe strings or metal rings for the eyes through which the strings pass, and nearly all devices without their housings, protective paints or lubricants.

Such a holding is so illogical as to be repugnant to common sense and reason and is directly opposed to the purpose of the patent system as stated in the Constitution, "to promote the progress of science and useful arts" (Art. I, Sec. 8).

The special nature of the design of the Stearns holiday detector is visually apparent from an examination of the Stearns detector, Plfs'. Ex. 17. The clear plastic case displays the special design of the electrical components and illustrates that the case itself is at one time the support for the electrical parts, a portion of the carriage and the handle for pushing the device. This integrated design has for its purpose the reduction in over-all size, the protection of the intricate portions of the device from the weather and dirt, and the streamlining of the device.

The facts of this case present no special aspect to justify departure from the rule announced in the other circuits. To the contrary, they present the perfect example of the fulfillment of the very purpose of the patent laws, the establishment of a small business based on the patent, and making available the patented equipment in the most perfect form possible. There is no evidence of a monopoly outside the patent itself nor any contractual tie-in of unpatented equipment. The absence of actual monopoly is attested by the total annual gross revenue of Stearns in the last year prior

to the trial which was only "approximately a quarter of a million dollars" (Stearns, R. II, p. 570). Certainly no monopoly in electrical apparatus.

This case is factually distinguishable from the principal case relied upon by Defendants of *Cardox Corporation v. Armstrong Coal Break Co.*, C. A. 7, 1952, 194 F. 2d 376. There the patent covered a cartridge and its valving for holding and quickly releasing compressed air. The patent owner made it available only as a part of a complete coal breaking apparatus arbitrarily termed an "Airdox Unit". The unit included truck loads of pipe, tubing and couplings; also a compressor, a motor, four blow-down valves, three line valves and three unions, etc. In other words, one of the classical examples of a tie-in.

The financial return for this equipment of the so-called "unit" was based upon the total tonnage of coal broken by the buyer annually, regardless of whether or not it was broken by this equipment. The court there held that the method of payment coupled with this restriction of the use of the cartridge to the other apparatus was a tie-in.

Stearns' business policy on the other hand is in a patented holiday detector, not some arbitrary unit. Stearns doesn't make the holiday detector available on the basis of the purchase of other pipeline equipment as coating, wrapping or machines for applying it. Just straight rental for money of holiday detectors.

There Is No Evidence To Support The Conclusion That Stearns Refuses To Make Available Its Electrode, Pusher And Carriage Except As A Complete Holiday Detector

Stearns testified that the Stearns Company did business in complete holiday detectors and that its parts business was

only for repair of its own holiday detectors (Stearns, R. I, p. 166). From this statement, the Trial Court concluded that Stearns refused to lease the electrode-pusher-carriage combination except as "tied to the electrical apparatus" (F. of F. 51(c), R. IV, p. 927). This conclusion was drawn in absence of any testimony that there was a market for the electrode-pusher-carriage combination, or that any one ever offered to buy or lease that particular apparatus that the Trial Court found Stearns refused to sell (F. of F. 47(a), R. IV, p. 927).

When the integrated character of the Stearns holiday detector is considered by reference to the physical exhibit Plfs'. Ex. 17, it is obvious that a market for the electrode-pusher-carriage, stripped of the "electric apparatus" in all probability just doesn't exist. This strong presumption, as a matter of law, cannot be overcome without some affirmative testimony. It certainly isn't supported by Stearns' testimony at page 166 of Volume I:

"Q. Mr. Stearns, does the D. E. Stearns Company sell or lease any parts of holiday detectors?

A. No, sir.

Q. They do not?

A. Except as replacement parts. If the damage to a machine is beyond the scope of ordinary wear and tear, a charge is made for repairs."

Neither does Rasor's testimony that Defendants do a substantial parts business for their own machines support the conclusion of Findings 51(c) or 54 that Stearns monopolizes the sale of electrical apparatus by *refusing* to sell the electrode-pusher-carriage combination alone (R. IV, p. 927 and p. 928). The price lists of Defendants (Physical Exhibits, Defs'. Ex. W and Y) show that the components of Defendants' different models are different with different

parts numbers. This further illustrates the special design of holiday detector components and the need for affirmative evidence to support the conclusion that Stearn *refuses* to sell the electrode-pusher-carriage combination except as a whole machine. Rasor testified at length as to the different electrical system used. Their C series were alternating current, the D series direct current, and Stearns used an impulse generator. The Defendants have utterly failed to meet their burden of proof of the defense of misuse of the patent.

A Refusal To Do Business Is Not A Tie-In In The Legal Sense That Has Been Condemned By The Courts. Instead, The Courts Have Condemned The Doing Of Business Upon A Tie-In Basis

The courts, including this Circuit, have held that it is not illegal to refuse to sell a device, patented or unpatented, unless other materials are purchased, but that it is illegal only where a device is *sold* with an agreement to take other material. Thus, the conclusion of the Trial Court that Stearns *refused* to sell the electrode-pusher-carriage combination was a misuse of the patent is erroneous, as a matter of law, for this additional reason.

United States v. Colgate & Co., 250 U.S. 300, at 307; 63 L. Ed. 992, at 997;

Leo J. Meyberg Co. v. Eureka Williams Corporation, C. A. 9, 1954, 215 F. 2d 100; Cert. Denied, 348 U.S. 875; 99 L. Ed. 689;

Hunter Douglas Corp. v. Lando Products, Inc., C. A. 9, 1954, 215 F. 2d 372, 376;

Nelson Radio & Supply Co., Inc. v. Motorola, Inc., C. A. 5, 1952, 200 F. 2d 911, at 915; Cert. Denied 345 U.S. 925; 97 L. Ed. 1356.

Stearns has, under the above authority, the unequivocal right to make what it wants to and to lease what it wants to.

It has chosen to make complete holiday detectors and leases them to anyone desiring same because that is what the market demands. Even if it *refused* to make and lease the "electrode-pusher-carriage" skeleton without the "electrical apparatus", such *refusal* is no tie-in because a bare refusal to do business is not a tie-in in the legal sense.

Stearns' Licensing Program, In Exacting A Royalty Of \$250.00 For The Practice Of The Invention For Eight Years, Is Both Reasonable And Legal

The Trial Court reasoned that the royalty of Stearns was so high compared with the price of Defendants' pusher wand and electrode, that licensees would be driven to deal only in whole holiday detectors (F. of F. 60, R. IV, p. 929). Even if this were true there is, as a matter of law, nothing illegal with the licenses. They could have been expressly restricted to just that.

Vulcan Mfg. Co. v. Maytag Co., C. A. 8, 1934, 73 F. 2d 136, 138-139.

In the *Vulcan* case, Maytag had a patent on a swinging wringer attachment for washing machines. Vulcan was licensed to make and sell attachments "for use only in connection with and as a part of power-operated washing machines of the general type and design shown in the circular attached". The license didn't extend to attachments sold separately. The suit was one for infringement for sale of washers outside the license and the alleged illegality of the license was raised as a defense. The Court in overruling this defense said:

". . . Obviously, the patentee is not compelled to choose between granting full and complete use under

the patent or granting no use. He may attach such limitations upon the use as do not go beyond the influence of his complete monopoly without granting licenses. Under the situation here, it is clear that this limitation in the license to use of the patented attachments to certain types of washing machines is well within the monopoly of the patent. * * * None of appellant's rights are invaded by this limitation, since it may cease using the patented device and manufacture any character of washing machines it desires with any other wringer and gearing attachments or with no such attachments."

However, the only condition Stearns exacts is the payment in money of royalties. The payment of money has never been held an unreasonable exercise of the patentee's right to exclude all others from the making, using or selling of the patented invention.

Actually, the royalty of \$250.00 for the life of the patent (more than eight years at time of trial) or \$31.25 a year, is extremely reasonable, especially for a patent such as Stearns' which this Court found was "a patent for an improvement which fills a long felt need, which those schooled in the art had not been able to devise before the patentee, and which meets with acceptance in the market"; 220 F. 2d 49, at 58.

In Findings 58 and 59, (R. IV, p. 929) which compare the cost of one Defendants' pushers and contactors and electrodes with the royalty, the lower Court failed to consider the following undisputed facts:

1. During the life of the patent, numerous electrodes (for each pipe size) and pusher contactors will be required and obtainable by the licensee from any source at no extra royalty (Rasor, R. II, p. 462).

2. The value of the invention and the resultant reasonableness of the license fee is shown by Rasor's testimony that Defendants, on their rental machines, would recover the full \$250.00 royalty in approximately one month (Rasor, R. II, p. 466).
3. One of Defendants' C-3 machines rented fifty weeks a year at Defendants' established rental rates would produce \$25,000.00 in eight years. \$250.00 would be a 1% royalty.
4. Compared to the value of the invention to the pipeline companies in protecting multi-million dollar investments, the license fee of approximately \$31.25 per year is nominal.

By statute the right of the patentee is that of excluding others from practicing the invention. Title 35, Sec. 154, of U.S.C. provides:

"Every patent shall contain * * * a grant * * * of the right to exclude others from making, using, or selling the invention throughout the United States * * *."

Stearns, by granting and offering to grant licenses has partially relinquished this right of exclusion instead of having restrained trade. This relinquishment is upon a basis that has no tie-in clause, price fixing or other entanglements, and the Trial Court made no findings to the contrary. The terms are, from the legal standpoint, reasonable *for they only exact a money royalty.*

E. Bement & Sons v. National Harrow Co., 186 U.S. 70, at 91; 46 L. Ed. 1058, at 1069;

United States v. General Electric Co., 272 U.S. 476, 489; 71 L. Ed. 362, 370;

Vulcan Mfg. Co. v. Maytag Co., C.A. 8, 1934, 73 F. 2d 136, 139.

In the *General Electric* case, it is stated at page 489 of the U. S. report, and at page 370 of the L. Ed. report:

" . . . Conveying less than title to the patent or part of it, the patentee may grant a license to make, use and vend articles under the specifications of his patent *for any royalty* or upon any condition the performance of which is reasonably within the reward which the patentee * * * is entitled to secure."

CONCLUSION

Claim 1 is infringed directly by Defendants' machines utilizing their pusher wands and spring electrodes of the type used in their C-3 series. The term "means rotatably engaging" is met squarely by this equipment, and this construction is commensurate with the status of the invention in the art. The patent as a whole and the file wrapper support these truisms.

Claim 7 is not met directly by Defendants' C-3 series, but the pioneer status of this invention, within the realm of rolling a spring electrode while supporting the electrical apparatus in a carriage which rides the pipe, entitles the claim to a broad range of equivalence. Defendants' detectors, exemplified by their C-3 model, with the substitution of the flexible wire connection between the carriage and wand for the rigid connection of Stearns, falls easily within this range of equivalence. The longitudinal movement of the carriage and wand is translated into the rolling movement of the electrode. The weight of the apparatus is supported by the pipe as a track. Thus, the work done is the

same, the equipment is substantially the same, and the function is the same.

Stearns' method of doing business is legal, logical and reasonable. The industry wants whole machines and requires parts only for repairing those machines on hand. Stearns hasn't refused to sell the electrode-pusher and carriage apart from the electrical apparatus. There just isn't any market for them. Even if it did, it is not a misuse, first because it is not a "tie-in" to sell a complete machine even though the patent refers only to a part of its components, and secondly the illegal tie-in is selling upon an agreement to take something else, not a *refusal* to sell separately.

Stearns' lease and licenses require nothing of the lessee or licensee but the payment of money. They are notably free of restrictions frequently found in such instruments and show no intent on Stearns' part of snubbing up to the letter of the law to squeeze the last measure of reward from the patent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing PLAINTIFFS-APPELLANTS' BRIEF ON SECOND APPEAL have been served upon the Defendants-Appellees this____day of_____, 1956, by mailing three copies to Edward B. Gregg, attorney of record for Appellees, at 410 Mills Building, San Francisco 4, California, the same being the last address of Edward B. Gregg known to Appellants and Appellants' attorneys, these copies being sent through United States mail, postage prepaid.

APPENDIX

EXHIBIT A

CLAIM 1: STEARNS PATENT No. 2,332,182

An electrical exploring device for detecting defects in an insulating coating on an elongated member which comprises

- (an exploring electrode
- Yellow (
- (in the form of a coiled spring adapted
- (
- (to extend about such member and
- (
- (having its ends secured together to
- Blue (
- (completely embrace such member,
- (and means
- (
- (rotatably engaging and forming a
- (
- (movable electrical contact with
- (
- Green (said spring
- (
- (at a position remote from the surface
- (
- (of said member
- (
- (for connecting said spring to a high
- (
- (voltage testing circuit and for rolling
- (
- (said spring along such elongated member.

EXHIBIT B

CLAIM 7: STEARNS PATENT NO. 2,332,182

In a device of the character described,

(
 Brown (a carriage comprising a platform on wheels,
 (
 (an exploring electrode
 (
 (in the form of a flexible elongated
 (
 (member of circular cross section and
 Yellow (of an electrically conductive material
 (
 (adapted to embrace such member adjacent
 (
 (said carriage,
 (and an electrode pusher and contactor
 (
 (carried by and electrically insulated
 (
 Green (from said platform and
 (
 (having parts in electrical and
 (
 (mechanical contact with said electrode

whereby movement of said carriage longitudinally
 along a member to be tested will cause a rolling
 movement of said electrode along such member.

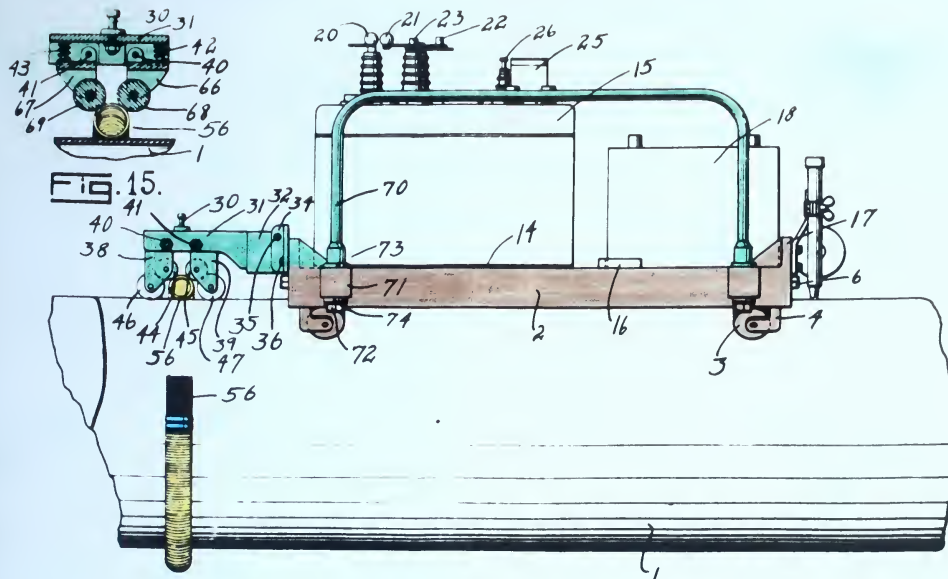


FIG. 1.

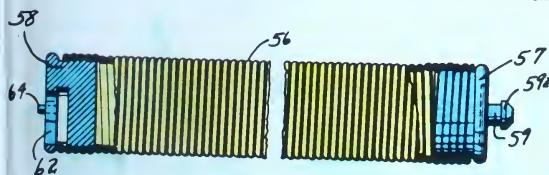


FIG. 7.

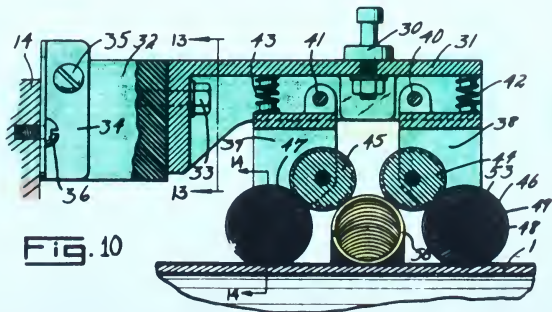


FIG. 10

EXHIBIT C

D. E. STEARNS
INSULATION TESTING DEVICE

Filed Aug. 23, 1941

2.332.182

At the right is shown Defendants' Model C-3 holiday detector. This is a drawing of Plaintiffs' Physical Exhibit 26-A, 26-B and 26-C. The parts are shown in operating position on a coated pipeline and the pusher wand is held in the position shown by the operator in operating the instrument. The pusher wand has the semi-sleeve bearing engaging the spring electrode for rolling it and making electrical contact, and is connected to the carriage through the flexible insulated electric cord.

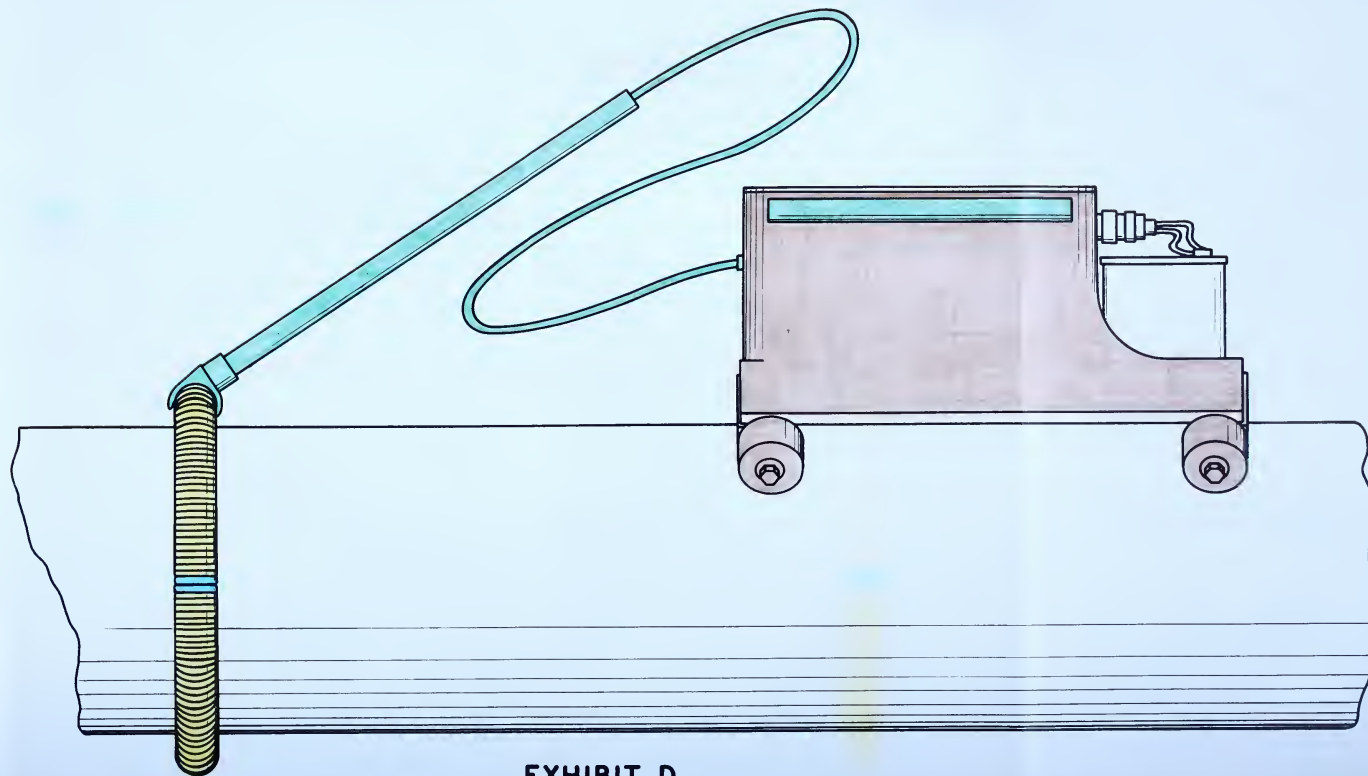


EXHIBIT D
DEFENDANTS' HOLIDAY DETECTOR





STANDARD LEASE AGREEMENT
STEARNS ELECTRONIC HOLIDAY DETECTOR
PIPE LINE USE

RENTAL SCHEDULE

The "RENTAL PERIOD" of each Detector shall be construed as beginning with the date on which the Detector is received by the LESSEE, and as ending with the date on which the Detector is received by STEARNS at Shreveport, Louisiana. Progress data shall be reported to Stearns by the LESSEE within ten (10) days after return of the Detector; and at such intermediate times during the "RENTAL PERIOD" as Stearns may request, but not oftener than once each calendar month. The rental charge shall be calculated on the basis of the linear pipe line footage at the appropriate rate as set forth in the table below:

Normal Pipe Size	Per Foot	Per Mile	Normal Pipe Size	Per Foot	Per Mile
6" or under	34¢	\$26.40	16"	0.625¢	\$33.00
8"	0.525¢	27.72	18"	0.650¢	34.32
10"	0.550¢	29.04	20"	0.675¢	35.64
12"	0.575¢	30.36	22"	0.700¢	36.96
14"	0.600¢	31.68	24"	0.725¢	38.28
			26" or over	34¢	39.60

PROVIDED, however, that the rental charge for each Detector during the "RENTAL PERIOD" shall be not less than an amount computed at Five Dollars (\$5.00) per calendar day nor more than an amount computed at Fifteen Dollars (\$15.00) per calendar day.

PROVISIONS TO BE IN EFFECT DURING THE "RENTAL PERIOD"

1. Stearns shall initially furnish two storage batteries with each Detector, at a job rental charge of \$15.00 for each battery, along with a suitable battery charger at no additional cost to LESSEE. LESSEE shall maintain batteries and, if required, may obtain additional batteries from Stearns at \$15.00 each. All batteries shall remain the property of Stearns and all useable batteries shall be returned with the Detector.
2. LESSEE shall furnish operating personnel for the Detector. Such operating personnel shall be of reliable and responsible nature in order to insure proper handling and care of the Detector.
3. LESSEE shall strictly follow Stearns' "Operating Instructions" for the care and operation of the Detector.
4. LESSEE assumes all public liability and holds Stearns harmless against any suit or claim for personal injury or property damage arising from the use or handling of the Detector.
5. Stearns shall promptly investigate the need of any proposed repairs upon receipt of request therefor from LESSEE.
6. LESSEE shall be responsible for loss of, and/or damage to the Detector and appurtenant equipment and shall pay for all repairs and spare parts except those necessitated by ordinary wear and tear.
7. All transportation charges to and from Shreveport, Louisiana, shall be borne by LESSEE.
8. All shipments of Detectors shall be by Railway Express, or by Air Freight, or by Air Express, unless otherwise authorized by Stearns.
9. All shipments of Detectors, by any carrier, shall be insured for One Thousand Dollars (\$1,000.00).
10. LESSEE shall not sub-let the Detector for use by others.

ACCEPTED:

LESSEE Company

By _____
Signature of Authorized Representative

Please Print or Type Name of Above Signatory

Title of Signatory

Date of Acceptance

THE D. E. STEARNS COMPANY

By _____
Signature of Authorized Representative

Date of Acceptance

EXHIBIT E

License Agreement

THIS AGREEMENT made and entered into as of the _____ day of _____, 19____, by and between
The D. E. Stearns Company, a partnership, of Shreveport, Louisiana, hereinafter called Licensor, and _____
_____ of _____
hereinafter called Licensee

WITNESSETH: That,

WHEREAS the Licensor is the owner of the entire right, title and interest in and to Letters Patent of the United States Number 2,332,182, issued October 19, 1943; and Licensee desires to secure a non-exclusive license to make or have made and to sell but not to use or lease electrode and electrode pusher combinations covered by the aforesaid Letters Patent, and Licensor is willing to grant the same.

NOW, THEREFORE, in consideration of the payment by Licensee to Licensor of the royalties hereinafter specified, the parties hereto have agreed:

I Licensor hereby grants unto Licensee the non-exclusive right and license to make or have made and to sell but not to use or lease electrode and electrode pusher combinations covered by the aforesaid Letters Patent throughout the United States, its territories and possessions, subject to the following terms and conditions.

II Licensee shall cause to be prominently placed upon each and every electrode and electrode pusher combination sold by Licensee under this license, a notice as required by Statute, showing the same to be covered by the aforesaid Letters Patent, and Licensee hereby acknowledges the validity of the aforesaid Letters Patent and Licensor's title thereto and agrees not to contest the same.

III Licensee agrees to render a written report to Licensor on or before the twentieth (20th) day of each calendar month showing the number of such electrode and electrode pusher combinations sold by Licensee under this license during the calendar month next preceding; and to pay to Licensor at the time of making such report a royalty equal to two hundred fifty dollars (\$250.00) for each such combination sold by Licensee during said next preceding calendar month; provided, however, that when a particular electrode and electrode pusher combination is sold for use with a particular high voltage unit, Licensee may cause to be attached permanently to such high voltage unit a plate or label which Licensor will furnish upon payment of each royalty of two hundred fifty dollars (\$250.00) hereinabove specified, said plate or label bearing a serial number and a notice that there is a license running with such unit for the use with such unit of electrode and electrode pusher combinations covered by the aforesaid patent, and Licensee may thereafter sell replacement electrode and electrode pusher combinations and parts thereof for use with the same high voltage unit and/or any other high voltage unit bearing such plate or label furnished or authorized by Licensor, without payment of further royalty thereon, but shall place upon each such combination or part or the container therefor a notice that same is licensed for use only with high voltage unit or units which have a license to use said combination running therewith. Nothing herein shall be construed as a license under any patent not identified herein or to use any particular high voltage unit or type thereof, or any equipment other than the electrode and electrode pusher combination and parts thereof, and nothing herein shall be construed as a restriction upon the type or make of high voltage unit with which said combination may be employed.

IV Licensee shall keep full and complete books of account relating to all sales of combinations and parts thereof under this license, and shall give Licensor or his representative full access thereto at all times during regular business hours.

V In the event that Licensee shall default in connection with any of the conditions of this agreement by failure to comply therewith, Licensor may terminate this agreement and the License herein granted upon thirty (30) days' notice in writing to Licensee; provided, however, that if Licensee shall, within said thirty (30) day period, make good such default, such notice shall be thereby rendered void and this agreement shall continue in full force and effect. No termination of this agreement shall affect Licensee's obligation to pay royalties accrued prior to such termination.

VI The License herein granted shall be personal to and not assignable by the Licensee without the consent of Licensor. This agreement shall inure to the benefit of the parties hereto, their successors and assigns.

IN WITNESS WHEREOF Licensor has hereunto fixed his signature and Licensee has caused these presents to be executed by its officers thereunto duly authorized.

Licensor: THE D. E. STEARNS COMPANY

By _____

Licensee: _____

By: _____

ATTEST:

Corporate Seal

Secretary



License Agreement

THIS AGREEMENT made and entered into as of the _____ day of _____, 19____, by and between
The D. E. Stearns Company, a partnership, of Shreveport, Louisiana, hereinafter called Licensor, and _____
of _____
hereinafter called Licensee

WITNESSETH: That,

WHEREAS the Licensor is the owner of the entire right, title and interest in and to Letters Patent of the United States Number 2,332,182, issued October 19, 1943; and Licensee desires to secure a non-exclusive license to make or have made and to use or lease but not to sell electrode and electrode pusher combinations covered by the aforesaid Letters Patent, and Licensor is willing to grant the same.

NOW, THEREFORE, in consideration of the payment by Licensee to Licensor of the royalties hereinafter specified, the parties hereto have agreed:

I Licensee hereby grants unto Licensee the non-exclusive right and license to make or have made and to use or lease but not to sell electrode and electrode pusher combinations covered by the aforesaid Letters Patent throughout the United States, its territories and possessions, subject to the following terms and conditions.

II Licensee shall cause to be prominently placed upon each and every electrode and electrode pusher combination used or leased by Licensee under this license, a notice as required by Statute, showing the same to be covered by the aforesaid Letters Patent, and Licensee hereby acknowledges the validity of the aforesaid Letters Patent and Licensor's title thereto and agrees not to contest the same.

III Licensee agrees to render a written report to Licensor on or before the twentieth (20th) day of each calendar month showing the greatest total number of electrode and electrode pusher combinations in use and on lease by Licensee at any one time during the next preceding calendar month; and to pay to the Licensor at the time of making such report a royalty equal to two hundred fifty dollars (\$250.00) for each such combination in excess of the total number of such combinations for which Licensee and its lessees hold certificates of paid up royalty as hereinafter described. Upon payment of each royalty of two hundred fifty dollars (\$250.00) Licensor will issue to Licensee a certificate in durable form that royalty has been fully paid for a license to the holder thereof, as agent or lessee of the Licensee to use one electrode and electrode pusher combination covered by the aforesaid Letters Patent, and such certificate shall be good for the life of said Letters Patent. The possession of each such duly issued certificate shall be sufficient evidence that the holder thereof, when acting as agent or lessee of Licensee, is authorized to use one such combination, and shall authorize the holder thereof to use different such combinations from time to time, but one such certificate shall not authorize the use of more than one such combination at any one time. Such certificate, in order to serve as authority to use one such combination shall be kept available on the job at all times during the use of such combination and shall be exhibited to an agent or representative of Licensor upon demand. Nothing herein shall be construed as a license under any patent not identified herein or to use any particular high voltage unit or type thereof or any equipment other than the electrode and electrode pusher combination and parts thereof, and nothing herein shall be construed as a restriction upon the type or make of high voltage unit with which said combination may be employed.

IV Licensee shall keep full and complete books of account relating to all use and lease of combinations under this license, and shall give Licensor or his representative full access thereto at all times during regular business hours.

V In the event that Licensee shall default in connection with any of the conditions of this agreement by failure to comply therewith, Licensor may terminate this agreement and the License herein granted upon thirty (30) days' notice in writing to Licensee; provided, however, that if Licensee shall, within said thirty (30) day period, make good such default, such notice shall be thereby rendered void and this agreement shall continue in full force and effect. No termination of this agreement shall affect Licensee's obligation to pay royalties accrued prior to such termination, nor shall any termination of this agreement affect the continued validity of any certificate of paid up royalty issued hereunder.

VI The License herein granted shall be personal to and not assignable by the Licensee without the consent of Licensor. This agreement shall inure to the benefit of the parties hereto, their successors and assigns.

IN WITNESS WHEREOF Licensor has hereunto fixed his signature and Licensee has caused these presents to be executed by its officers thereunto duly authorized.

Licensor: THE D. E. STEARNS COMPANY

ATTEST:

Corporate Seal

By _____

Licensee:

Secretary

By: _____

No. 15,111

In the
United States Court of Appeals
For the Ninth Circuit

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a partnership composed of Dick
E. Stearns and Ellen Belson Stearns,

Appellants-Appellees,

vs.

TINKER & RASOR, a corporation JOHN P.
RASOR and LEO H. TINKER,

Appellants-Appellees.

Opening Brief of Tinker & Rasor, John P. Rasor
and Leo H. Tinker in Support of Their Appeal

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FILED

AUG 31 1956

PAUL P. O'BRIEN, CLERK

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No. 15,111

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Appellants-Appellees.

Opening Brief of Tinker & Rasor, John P. Rasor and Leo H. Tinker in Support of Their Appeal

I.

INTRODUCTION

This cause is before this Court for the second time. Plaintiffs below (Dick E. Stearns and the D. E. Stearns Company, a partnership), appeal from Paragraphs I and III of the Judgment of the District Court (R. 934) dismissing their complaint and awarding costs in the trial court to defendants. Defendants below (Tinker & Rasor, a corporation, John P. Rasor and Leo H. Tinker), appeal from Paragraphs II and IV of the same Judgment (R. 934) dis-

missing their counterclaim for damages and awarding Plaintiffs costs for the first appeal.

This brief is in support of Defendants' appeal from Paragraphs II and IV of the Judgment.

Because both sides have appealed and because this is the second of two appeals, it is deemed advisable to outline briefly the history of the case.

For convenience, certain terms are used as follows:

"Plaintiffs" is used to designate the parties Dick E. Stearns and the D. E. Stearns Company, while "Defendants" is used to designate the parties Tinker & Rasor, John P. Rasor and Leo H. Tinker.

"First Judgment" designates the Judgment rendered September 23, 1952 (R. 32, 33).

"First Appeal" designates Appeal No. 13,634 which was taken from the First Judgment.¹

"Second Judgment" designates the Judgment rendered March 8, 1956, dismissing the Second Amended Complaint, dismissing Defendants' Counterclaim, etc. (R. 933-935).

"Second Appeal" designates the present appeal, No. 15,111, which is from the Second Judgment.

This is a patent infringement suit in which several issues are raised by the pleadings, including validity of the patent (Stearns Patent No. 2,332,182, hereinafter referred to as the "Stearns Patent"), infringement of the patent by Defendants, and misuse of the patent by Plaintiffs.

On September 23, 1952, the District Court found Claims 1 and 7 (the only claims in issue) to be invalid for lack of invention (Findings Nos. 25 and 26, R. 31); made no findings on the other issues (see Finding No. 27, R. 31); and entered its First Judgment.

1. By Stipulation of the parties, subject to the Rules of this Court, the printed record on the First Appeal may be used in this present appeal (R. 1022). This printed record, consisting of three volumes, is supplemented by a fourth volume which is paged consecutively with the first three volumes.

ment dismissing the Second Amended Complaint (R. 32, 33). On the First Appeal, No. 13,634, this Court reversed the holding of invalidity and remanded the case for determination of the other issues. The opinion of this Court is reported at 220 F.2d 49; the mandate is printed in the record at R. 911-913.

Further proceedings in the nature of oral arguments were had before the District Court on November 10, 1955 (R. 937-1013). Subsequently the District Court entered Findings of Fact (R. 914-929, modified at R. 932, 933), Conclusions of Law (R. 930, 931, modified at R. 932-933), and the Second Judgment (R. 933-935). The District Court held that four devices manufactured by the individual Defendants infringe the Stearns Patent (Conclusion of Law No. II, R. 930), but that none of the devices manufactured by the corporate defendant infringes the Stearns Patent (Conclusion of Law No. IV, R. 930). The District Court also held that Plaintiffs are not entitled to relief because they have misused the Stearns Patent (Conclusion of Law No. III, R. 930). Judgment was entered accordingly dismissing the Second Amended Complaint (Par. I of Second Judgment, R. 934). Plaintiffs appeal from that portion of the Second Judgment.

The District Court also dismissed Defendants' Counterclaim for damages and awarded Plaintiffs costs on the First Appeal (Pars. II and IV of the Second Judgment, R. 934). Defendants appeal from that portion of the Second Judgment.

II.

STATEMENT OF THE PLEADINGS

The pleadings before this Court are Second Amended Complaint alleging infringement by Defendants of Claims 1 and 7 of the Stearns Patent (R. 3-6); Defendants' Answer and Counterclaim (R. 6-15); and Plaintiffs' Reply to Defendants' Counterclaim (R. 15-17).

Of the issues raised by these pleadings, only the following are relevant to this Appeal: (1) Whether Claims 1 and 7 of the Stearns Patent are infringed by devices manufactured by the corporate defendant Tinker & Razor. (2) Whether Plaintiffs have misused the Stearns Patent. (3) Whether Defendants have been damaged by such misuse. In addition, the question of costs on the First Appeal is involved. This brief concerns only issue (3) and the issue of costs.

A. Jurisdiction.

Jurisdiction of the District Court, insofar as the Second Amended Complaint is concerned, is based upon Section 1338(a) of Title 28, United States Code. Insofar as Defendants' Counterclaim is concerned, jurisdiction is based upon Sections 1338(a), 2201 and 2202 of Title 28, United States Code. Jurisdiction of this Court is based upon Section 1291 of Title 28, United States Code. It is believed that jurisdiction of both Courts on all issues is uncontested.

B. The Parties.

The parties are as follows:

On the Plaintiffs' side, Dick E. Stearns, a resident of Shreveport, Louisiana, and the D. E. Stearns Company, a partnership consisting of Dick E. Stearns and Ellen Belson Stearns.

On the Defendants' side, Tinker & Razor, a corporation of California having its principal place of business in the Southern District of California; and two individuals, John P. Razor and Leo H. Tinker, both residents of the Southern District of California, who operated the business of the corporation as a partnership prior to its incorporation.

STATEMENT OF THE CASE**A. Dismissal of Defendants' Counterclaim for Damages.**

Paragraph V of Defendants' Counterclaim alleges that the defendant Tinker & Razor has been damaged by reason of Plaintiffs' misuse of the Stearns Patent (R. 14). The facts constituting misuse are alleged in Paragraphs XIII, XIV and XV of the Answer, which are incorporated in the Counterclaim by reference (R. 13, 14).

The District Court found (Findings Nos. 49 to 55, R. 926-928), that Plaintiffs have engaged in an illegal tie-in practice as follows: Plaintiffs' product is a holiday detector (a device for inspecting pipeline coatings to locate flaws in the coatings) consisting of patented components and unpatented components. The patented components are an electrode-pusher-carriage combination and the unpatented components are the electrical high voltage generating and signaling apparatus. The latter (the unpatented components) represent the major portion of the cost of a Stearns holiday detector, and are separable and divisible from the patented components. Plaintiffs stifle trade and restrain competition in unpatented materials by reason of their business policy, which is to lease, rather than sell, holiday detectors, hence depriving users of the opportunity to purchase and acquire ownership of detectors; and by reason of the fact that Plaintiffs will lease only complete detectors, including patented and unpatented components, thereby requiring users to accept unpatented components as a condition of obtaining patented components.

The effect of this restrictive tie-in policy is summarized by Finding No. 55 (R. 928), as follows:

"Finding No. 55. The actual, realistic effect of the tie-in policy of the D. E. Stearns Co. is to restrain trade and competition in unpatented materials, more particularly, in electri-

cal high voltage and signaling apparatus and components for holiday detectors.”

Having found a restraint of trade, the District Court adopted Finding No. 56 (R. 928, 929) that the Defendant Tinker & Rasor had been injured and damaged in its business thereby, and held that Plaintiffs are entitled to an accounting (Conclusion of Law No. IX, R. 931), but upon motion of plaintiffs, the District Court deleted Finding No. 56 and Conclusion of Law No. IX upon the ground that no damage had been proved (R. 932, 933).

There is uncontradicted testimony that Defendants have a substantial business in the supply of parts for holiday detectors but have not sold any parts for the leased Stearns detectors (R. 438-441). This, we submit, proves the *fact* of damage, and an accounting should have been ordered to determine the *amount* of damage.

B. The Awarding of Costs to Plaintiffs for the First Appeal.

The mandate of this Court awarded Plaintiffs costs expended in the First Appeal. Such costs have been taxed in the amount of \$2,083.81, of which \$2,056.81 is for printing the record for the First Appeal (R. 913). Paragraph IV of the Judgment of the District Court, from which this appeal is taken, has awarded these costs to Stearns (R. 934).

As developed more fully in the Argument, *infra*, it is Defendants' contention that costs for the First Appeal should abide the outcome of this Second Appeal, chiefly because almost all these costs are for a printed record which is being used in the Second Appeal. If Defendants should prevail in the Second Appeal, they should not be taxed for the cost of printing almost the entire record used in the Second Appeal; some equitable apportionment should be made.

SPECIFICATION OF ERRORS

Defendants, in their appeal, maintain that the following errors were committed by the District Court (R. 1021):

- (1) The District Court erred in dismissing Defendants' counterclaim for damages, and should have ordered an accounting to determine the amount of the damages sustained by Defendants by reason of Plaintiffs' misuse of the Stearns Patent.
- (2) The District Court erred in awarding Plaintiffs costs on the First Appeal, and should have allowed costs on the First Appeal to abide the outcome of the Second Appeal.

V.

SUMMARY OF ARGUMENT

A. Dismissal of Defendants' Counterclaim for Damages.

The District Court found as a fact (Findings Nos. 46 to 55, R. 926-928) that Plaintiffs have been guilty of an illegal tie-in of patented with unpatented materials and that such tie-in has restrained trade in unpatented materials. There is uncontradicted testimony that Defendants sell unpatented materials of the type whose trade is restrained, but have not been able to sell such unpatented materials for use with Plaintiffs' patented materials. This establishes the *fact* of damage, and the District Court should have ordered an accounting to determine the *amount* of damage.

B. The Awarding of Costs to Plaintiffs for the First Appeal.

Costs on the First Appeal (as to which Plaintiffs prevailed) are almost entirely for printing of the record. The same record is used in this Second Appeal, in which Plaintiffs are appellants. If Defendants prevail in the Second Appeal, they are, therefore, entitled to an equitable apportionment of costs of the First Appeal.

ARGUMENT**A. Dismissal of Defendants' Counterclaim for Damages.**

This is an action for patent infringement brought by Plaintiffs for alleged infringement of Claims 1 and 7 of the Stearns Patent. The Stearns Patent confers upon Plaintiffs a legal monopoly of the invention claimed, but no more. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510; 61 L. Ed. 871, 876 (1917). Insofar as Plaintiffs restrain trade within the scope of their legal patent monopoly, we have no quarrel. The dispute arises concerning the fact (so found by the District Court, Findings Nos. 46 to 55, R. 926-928), that Plaintiffs go further than this and employ the Stearns Patent to restrain trade in unpatented materials. This conduct is unlawful (*Motion Picture Patents Co. v. Universal Film Mfg. Co.*, supra, and *Mercoide v. Mid-Continent Investment Co.*, 320 U.S. 661, 665, 666; 88 L. Ed. 376, 381 (1944)). Such unlawful conduct gives rise to an action for treble damages on the part of anyone injured thereby. The pertinent statutory law on the subject is as follows:

Section 3 of the Clayton Act, 15 U.S.C.A. 14, reads in part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 1 of the Sherman Anti-Trust Act, 15 U.S.C.A. 1, reads in part as follows:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * is declared to be illegal. * * *”

Section 4 of the Clayton Act, 15 U.S.C.A. 15, reads in part as follows:

“Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

The Stearns Patent relates to a device known as a “holiday detector”, which is a device for detecting flaws in pipeline coatings. Findings of Fact Nos. 46 to 55, and 57 to 60 (R. 926-929)² accurately set forth the factual situation regarding Plaintiffs’ misuse of the Stearns Patent and their monopolistic practices. Thus, the Stearns Patent is for one component of a holiday detector, namely, an electrode-pusher-carriage combination, hereinafter referred to as the “Patented Apparatus”, (Finding No. 47(a), R. 927). Plaintiffs’ device consists of this Patented Apparatus and certain electrical high voltage generating and signaling apparatus, hereinafter referred to as the “Electrical Apparatus” (Finding No. 47(b), R. 927). The Electrical Apparatus is not covered by the Stearns Patent, but it represents the major portion of the cost of a Stearns holiday detector (Findings Nos. 48, 49, R. 927). The Patented Apparatus represents only a minor portion, not greatly in excess of 10%, of the cost of the complete apparatus (Finding No. 50, R. 927). Plaintiffs follow the policy of leasing, but refuse to sell their holiday detector and they refuse to sell or lease components of their holiday detectors. Plaintiffs will not make their Pat-

2. Finding No. 56 was deleted upon motion of Plaintiffs (R. 932, 933).

ented Apparatus available except in conjunction with and tied to the unpatented Electrical Apparatus. Plaintiffs require their lessees to lease the complete apparatus (Finding No. 51, R. 927, 928). Were it not for this restrictive, tie-in policy of Stearns, it would be feasible to employ electrical apparatus of competitors with the Patented Apparatus of Stearns. Such competition has been stifled because of the unlawful tie-in policy of Stearns. The actual realistic effect of this policy has been to restrain trade in unpatented materials, more particularly, in electric high voltage and signaling apparatus and components thereof (Findings Nos. 53, 54 and 55, R. 928).

Specifically, Mr. Rasor testified that the corporate defendant, Tinker & Rasor, sells any and all parts of holiday detectors; that some of Tinker & Rasor's parts could be used with Plaintiffs' detector; that the sale of parts constitutes a substantial portion of its business; but that Tinker & Rasor had sold no parts for Plaintiffs' detectors (R. 438-441).

It is a necessary inference from these facts (i.e., that Tinker & Rasor sell components of holiday detectors, some of which could be used with Plaintiffs' holiday detectors, yet Tinker & Rasor has not been able to sell such parts for Plaintiffs' detectors), that Tinker & Rasor has been precluded from a substantial amount of parts business by reason of the unlawful tie-in policy of Plaintiffs. This Court may take judicial notice of the fact that in most industries concerned with the manufacture of machinery, there exists a thriving trade in parts for machines. Thus, in the automobile business, only General Motors and its dealers may sell Chevrolet automobiles, but the purchasers of Chevrolet automobiles are free to, and do, in fact, buy tires, batteries, generators, fan belts, etc., for their Chevrolets from sources other than General Motors and its dealers.

The record in this case establishes beyond peradventure, and Finding No. 55 (R. 928) so states, that "The actual, realistic effect

of the tie-in policy of the D. E. Stearns Co. is to restrain trade and competition in unpatented materials, more particularly, in electrical high voltage and signaling apparatus and components thereof for holiday detectors.”

The only question decided adversely to Defendants is the question whether Defendants have proved that they have been damaged. Finding No. 56, adopted by the District Court on December 29, 1955 (R. 928) held that Tinker & Rasor had been damaged. This finding was deleted upon motion of Plaintiffs (R. 932, 933).

We do not contend that Defendants have proved any specific quantum of damages, but we do contend that Defendants have amply proved the *fact* of damage. The District Court should not have deleted Finding No. 56 (R. 928, 929); it should not have deleted Conclusion of Law No. IX (R. 931) holding that Defendants entitled to an accounting; and it should not have dismissed Defendants’ counterclaim for damages.

Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 264 90 L.Ed. 652, 660 (1946) establishes the rule that once the *fact* of damage from monopoly or restraint of trade has been established, the *amount* may be proved by inference and circumstantial evidence.

In *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 769, C.A. 7, (1930), the Court stated:

“It is true, plaintiff’s proof of damages depends largely upon what is commonly called circumstantial evidence. To a certain extent this is supplemented by inferences deducible from such evidence. But such proof is sufficient to support a recovery of substantial damages.”

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 855 C.A. 8 (1952), restates the rule of the *Bigelow Case*, especially where the uncertainty is caused by defendants own tortious acts. The Court pointed out that there must be more certainty with regard to the *fact* of the damage than with regard to the *amount* of damage.

The *fact* of damage has been proved with certainty in the present case.

Other authorities in point are *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 75 L.Ed. 544, 548 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 71 L.Ed. 684, (1927); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 425, 426, C.A. 10 (1952). *C-O Two Fire Equipment Co. v. U. S.*, 197 F.2d 489, 494 C.A. 9 (1952) (A Ninth Circuit case in a criminal prosecution for violation of the anti-trust laws, which held that even in a criminal case a conviction may be sustained on the basis of circumstantial evidence and that the government might rely on inferences drawn from a course of conduct.) *American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F.2d 622, C.A. 9 (1952). (Another Ninth Circuit case, stating at page 626:

“Crystal is not in the circumstances in a position to capitalize on the uncertainties or on the difficulties of making proof.”)

Lawlor v. National Screen Service Corp., 349 U.S. 322, 329, 99 L.Ed. 1122, 1128, decided in 1955. The opinion, written by Chief Justice Warren, refers at 349 U.S. 329 to

“the public interest in vigilant enforcement of the anti-trust laws through the instrumentality of the private treble-damage action.”

The record herein clearly establishes the *fact* of damage. The District Court should have so found and should have ordered an accounting to determine the *amount* of damages.

B. The Awarding of Costs to Plaintiffs for the First Appeal.

On July 2, 1952, the District Court filed its opinion holding Claims 1 and 7 of the Stearns Patent invalid for lack of invention and instructed Defendants' counsel to prepare Findings of Fact, Conclusions of Law and a Judgment (R. 18-25; 108 F. Supp. 237).

Findings of Fact, Conclusions of Law, and a Judgment were prepared, filed and served. In preparing the same, Defendants' counsel observed Rule 7(a) of the Rules of Practice for the United States District Court, Southern District of California. That rule requires counsel for the successful party to prepare findings of fact and conclusions of law which "shall embody the Court's decision." The Court's decision dealt exclusively with the question of invention and made no mention of any other issue (e.g., whether the claims were infringed, and whether there had been misuse of the patent). Accordingly, counsel for Defendants prepared, served and submitted findings which were limited to the issue of invention. Original Finding No. 27 in support of the First Judgment so stated. That finding read as follows (R. 31):

"(27) It being found that the subject matter of said Letters Patent [i.e., the Stearns Patent] does not amount to invention over the state of the art, it is deemed unnecessary to make findings as to infringement, as to the defense alleged by defendants that Claims 1 and 7 are invalid for failure to particularly point out and distinctly claim the invention, and as to the defense alleged by defendants that said Letters Patent has been misused by plaintiffs."

At no time did Plaintiffs' counsel object to the absence of findings on other issues. At no time did Plaintiffs' counsel request findings with regard to other issues. Therefore, in connection with the First Judgment in this cause, counsel for all parties and the District Court were satisfied to limit the findings to formal matters such as identification of the parties, to jurisdiction, and to the question of invention. All were satisfied to reserve findings as to the other issues.

As stated hereinabove, Plaintiffs took an appeal from the First Judgment of the District Court. In so doing, they designated the following portions of the record be printed (R. 584-587): The Second Amended Complaint; the Answer and Counterclaim there-

to; Plaintiffs' Reply to the Counterclaim; the entire Reporter's Transcript of Proceedings at the Trial (which accounts for all but a few pages of Volumes I and II of the present printed record); 30 documentary Exhibits (which account for Volume III of the present printed record); the Opinion of the District Court; Findings of Fact and Conclusions of Law in Support of the First Judgment; the First Judgment; and several documents relating to the First Appeal.

The bill of costs for the First Appeal is as follows (R. 913):

Clerk of District Court.....	\$ 2.00
Printing Record.....	2,056.81
Docket fee, Court of Appeals.....	25.00
	<hr/>
	\$2,083.81

It is evident that almost the entire cost bill is for printing the record.

Defendants have won on the patent infringement and misuse issues, and Plaintiffs have taken a Second Appeal from an adverse judgment of the District Court. In this Second Appeal precisely the same printed record is employed as was employed in the First Appeal, supplemented by about 111 pages of additional record. A brief examination of the printed record will disclose that a major portion thereof relates to the issues of infringement and misuse (as to which Defendants have prevailed).

If Defendants prevail in the Second Appeal, then, in accordance with Rule 25 of the Rules of Practice of this Court, Defendants will be entitled to costs. It would be patently unjust, in such an event, for Plaintiffs to be taxed merely with the cost of printing the fourth volume of the Transcript of Record, consisting of only 111 pages out of a total of 1,022 pages, and for the prevailing party, the Defendants, to be taxed with the cost of printing the remaining 908 pages of the printed record.

Obviously, the only just course of procedure is for the matter of costs on the First Appeal to abide the outcome of the Second Appeal, and for an equitable apportionment to be made at that time.

There is very little law on the subject. In *Jennings v. Burton*, 177 Fed. 603, decided in 1910, plaintiffs had recovered a judgment after the first of two trials on appeal from the first judgment. The Court of Appeals found error and reversed with costs to defendant, which were taxed to and paid by plaintiffs. Then a second trial was had and plaintiffs prevailed again. Plaintiffs sought to tax, as an item of costs, the costs of the first appeal. The trial court held that the costs of the first appeal should not be taxed against the defendant.

At first blush, *Jennings v. Burton* might seem to support Paragraph IV of the Second Judgment herein, awarding costs on the First Appeal to Plaintiffs. However, note that there were two trials in *Jennings v. Burton*; i.e., a first trial resulting in a judgment for plaintiffs which was reversed, and then a second trial in which the plaintiffs prevailed again. In the present case, there has been only one trial, and it is the printed record resulting from that single trial, supplemented to a very small degree by the transcript of the November 10, 1955 arguments, Findings of Fact, Conclusions of Law and Judgment, etc., which constitute the printed record in this Second Appeal. Thus, in effect, the successful party would be forced to pay almost the entire costs of the Second Appeal if Defendants should prevail as to Paragraphs I, II and III of the Second Judgment but should fail as to Paragraph IV.

The only just course is to apportion the costs of the First Appeal equitably in the light of the outcome of this Second Appeal.

CONCLUSION

The Judgment of the District Court entered February 9, 1956 should be modified to the extent that Paragraphs II and IV thereof are reversed; an accounting ordered to ascertain the amount of Defendants' damages sustained by reason of the Plaintiffs restraint of trade in competition in unpatented materials; and the costs of printing the record in the First Appeal should be equitably apportioned between the parties.

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Certificate of Service

Three copies of the within brief were served upon Dick E. Stearns and the D. E. Stearns Company on the 31st day of August, 1956 by mailing three copies to H. Calvin White at 611 Wilshire Blvd., Los Angeles 17, California, attorney of record for the said parties, the same being the last address of said H. Calvin White known to the undersigned, such copies being sent through United States mail, postage prepaid.

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No. 15,111

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a partnership composed of
Dick E. Stearns and Ellen Belson Stearns,

Appellants-Appellees,

v.

TINKER & RASOR, a corporation, JOHN P.
RASOR and LEO H. TINKER,

Appellants-Appellees

Brief of Dick E. Stearns and The D. E. Stearns Com-
pany Answering the Opening Brief of Tinker and
Rasor, et al., in Support of Their Appeal

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PAUL P. O'BRIEN, CLERK

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No. 15,111

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**Brief of Dick E. Stearns and The D. E. Stearns Com-
pany Answering the Opening Brief of Tinker and
Rasor, et al., in Support of Their Appeal**

Introduction

The pleadings, history and status of this case have been amply stated in the opening briefs of the Plaintiffs and Defendants in support of their respective appeals. At the outset, however, it is pointed out that if Plaintiffs' appeal is successful it will be dispositive of both appeals, and this appeal of Defendants must fail. This is true because De-

fendants' counterclaim, the dismissal of which is urged as error by Defendants on their appeal, is dependent upon Plaintiffs having misused the Stearns patent, which is vigorously attacked by Plaintiffs in their appeal. As to Defendants' claim that Judge Westover erred in following the mandate and awarding Plaintiffs the costs of their first and successful appeal, this ground of appeal, of course, could not prevail if this Court finds Plaintiffs have not misused the Stearns patent, for its infringement by at least four holiday detectors of the individual Defendants is admitted and established by the lower Court's findings.

The Issues

Plaintiffs, in their brief in support of their appeal, fully treat the issue of the alleged misuse of the Stearns patent. Therefore, this brief is restricted to the issues.

- (1) Did the lower Court err in dismissing the counterclaim on the ground that Defendants had not proven damage to their business or property as the proximate result of what the Court held to be misuse by Plaintiffs of the Stearns patent?
- (2) Did the lower Court err in following the mandate of this Court on the first appeal and awarding costs to Plaintiffs in the amount awarded by the mandate to Plaintiffs?

Statement of the Case

For the purpose of this brief, it will be assumed that the lower Court did not err in finding misuse of the Stearns patent by Plaintiffs. Of course, such misuse is denied and is one of the basic issues of Plaintiffs' separate appeal.

The lower Court, pursuant to the mandate on the first appeal, conducted proceedings in the nature of an oral argument and thereafter announced its ruling holding against Plaintiffs, dismissing their complaint for patent infringement. The Court requested that findings of fact and conclusions of law be submitted by Defendants' counsel, which were presented along with a judgment dismissing the complaint, allowing the counterclaim, and ordering an accounting to determine the quantum of Defendants' damage and awarding all costs including those of the first appeal to Defendants. These were signed and entered by the Court, and thereafter Plaintiffs moved to modify and amend the judgment, findings of fact, and conclusions of law to accomplish the following, which was ordered by the Court: (Order, R932)

- (1) To delete finding of fact 56, which found that Defendants' business had been damaged (finding of fact 56, R928).
- (2) That the conclusion of law IX be deleted.
- (3) To delete paragraph II of the judgment (sustaining the counterclaim and ordering an accounting), and to substitute:

"that the counterclaim for damages presented with the answer to the second amended complaint herein be and is hereby dismissed upon the merits."

- (4) That the judgment be further amended and modified by adding to paragraph IV the following:

"that cost be awarded to the Plaintiffs in the sum of _____ for the first appeal as per the Court of Appeals' mandate."

(5) That paragraph III of the judgment be amended to read:

“that cost in the lower court be awarded the Defendants in the sum of _____.”

The final judgment from which Defendants' appeal as to paragraphs II and IV was entered February 9, 1956 (R933-935).

The basis for the Court's dismissal of the counterclaim was that Defendants had proven no damage to their business, which is one of the statutory prerequisites for a suit by a private party for treble damages based on the antitrust laws. Section 4 of the Clayton Act, 15 U.S.C.A. 15, provides that “any person * * * injured in his business or property by reason of anything forbidden in the antitrust laws may sue” therefor and recover damages. The trial court, when Plaintiffs' motion to modify the judgment, etc., called this to its attention, realized that Defendants had not offered any evidence proving damage to their “business or property” and therefore sustained Plaintiffs' motion (Order, R932).

As to the awarding of costs for the first appeal to Plaintiffs, the lower Court very properly followed this Court's mandate and allowed Plaintiffs the cost of their first appeal in the amount of the award in the mandate.

Defendants' evidence shows that they entered the holiday detector business several years subsequent to Plaintiffs and had developed a number of differently designated models of detectors and have offered for sale parts for use with their various models. For each model of their detector, they have a separate parts list, and the corresponding parts of their different models are sufficiently different that they

are differently numbered on the various lists (Def.'s physical Exhibits W and Y).

The sole evidence of possible damage to Defendants' business is Mr. Razor's testimony that they "*could supply*" the battery, an electrode, "possibly a ground wire", and a pusher wand for the Stearns machine and that he was "*not aware of*" any parts' sales for Stearns detectors. There is no evidence that they ever even offered or intended to offer to sell these parts for Plaintiffs' detectors; were prepared to do so prior to the filing of this suit; or the probability that there would have been a market in San Gabriel, California, for parts for detectors leased from Shreveport, Louisiana, except for Plaintiffs' alleged violation of the antitrust laws.

The pleadings show that Plaintiffs' office and place of business is in Shreveport, Louisiana, while Defendants' is in San Gabriel, California. The evidence shows Plaintiffs' products are distributed for use throughout the Mid-Continent area, the Gulf Coast area, and the East. Plaintiffs introduced in evidence a customer list (Plaintiffs' physical Exhibit 38), and Mr. Belson testified that, as Plaintiffs' general manager, he had the customer list prepared and that of the 252 customers listed the only customers on the West Coast were:

- (1) Pacific Pipeline and Engineers, Ltd.
- (2) Pacific Lighting Corporation.
- (3) Southern California Gas Company.
- (4) Southern Counties Gas Company.

Mr. Belson also testified that the year 1949 was the last year in which one of the Stearns detectors was leased for use on the West Coast. Mr. Razor testified that Defendants

commenced their business in 1948 and the corporate Defendant was organized on October 6, 1948 (Rasor, R. 403). It is completely illogical that Defendants, operating from Southern California, would sell parts for detectors of Plaintiffs, operating in distant sections of the United States, in absence of clear, cogent, and convincing proof to the contrary.

There is no evidence that Defendants ever intended to go into a parts business for Plaintiffs' holiday detectors, or ever solicited orders or advertised for orders for parts for Plaintiffs' holiday detectors. The locale of operation of Plaintiffs and Defendants is far removed.

Summary of Argument

A. Dismissal of Defendants' counterclaim for damages because Defendants proved no damage to their business or property as a proximate result of Plaintiffs' acts allegedly in violation of the antitrust laws.

Assuming that Plaintiffs' policy of leasing only whole holiday detectors is a tie-in of the materials which go into the holiday detectors that are not enumerated in the patent claims, with the parts that are specifically enumerated in the patent claims, so as to constitute an illegal tie-in in restraint of trade, which is violative of the antitrust laws, nevertheless Defendants have not assumed their burden of proof of the *fact* that their business or property has been damaged by such business practices of Plaintiffs and have indeed offered no proof that any such damage was ever sustained. Under the authorities and statutory provision upon which Defendants' counterclaim is based, such lack of proof of the fact of damage is full support for the Dis-

strict Court's action in dismissing Defendants' counterclaim.

- B. The award of cost to Plaintiffs for their successful first appeal followed this Court's mandate and was not error.**

The lower Court had no alternative but to follow the mandate of this Court and award the Plaintiffs costs in the amount of the award of the mandate. Such action by the Court was proper and not in error.

Argument

- A. Dismissal of Defendants' counterclaim for damages because Defendants proved no damage to their business or property as a proximate result of Plaintiffs' acts allegedly in violation of the antitrust laws.**

Section 4 of the Clayton Act, 15 U. S. C. A. 15 is a statutory provision for treble damage suits to be brought by a party who has been damaged "in his business or property" by the violation of the antitrust laws. This section reads in part as follows:

*"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Law may sue therefor * * *."*

The courts have uniformly held that it is incumbent upon the alleged injured party to prove damage to his business or property as a proximate result of the acts found to violate the antitrust laws in order to sustain an action based on this Section. This may be stated that it is necessary to

prove the fact of damage. Indeed, Defendants' brief admits this to be the law, and the cases cited by Defendants are all to this effect. Defendants' brief, however, assumes that the fact of damage is proved and then discusses the quantum. The dispute here is whether the fact of damage has been proved, and this Court need go no further.

In dismissing the counterclaim for Defendants' failure to prove damage to their business or property, as distinguished from the damage to the public generally, the trial Court followed this well established rule of law.

Twentieth Century-Fox Film Corp. v. Brookside Theater Corp., 194 F. 2d 846, 855;

Suckow Borax Mines Consolidated, Inc., et al. v. Borax Consolidated, Ltd., et al., 185 F. 2d 196;

Triangle Conduit and Cable Co. v. National Electric Products Corporation, 152 F. 2d 398 (C.A. 3, 1945).

American Banana Company v. United Fruit Company, 166 F. 261 (C.A. 2, 1908);

Bigelow v. R. K. O. Radio Pictures, 327 U.S. 251, 90 L. Ed. 652.

The issue here involved is one purely of fact, and the trial Court's determination that Defendants had not proven the fact of injury to their business or property and the dismissal of the counterclaim should not be reversed in the absence of clear error. *Graver v. Linde*, 339 U.S. 605, 611, 94 L. Ed. 1097, 1104.

Defendants' contention is that they have proven injury by Razor's testimony that they sell parts for use on their own holiday detectors and that their battery, electrode, "possibly a ground wire", and pusher wand *could be* used with the Stearns detector, but that he was "not aware" that they had sold parts for Plaintiffs' detectors.

The testimony Defendants urge shows the fact of damages is so patently short of proof of damage to Defendants' business as a proximate result of Plaintiffs' alleged antitrust violation that it is reproduced below in its entirety. (Defendants' brief, page 10, first full paragraph). (R. 438-441).

"Q. Mr. Razor, does the defendant Tinker and Razor sell any parts of holiday detectors?

A. Tinker and Razor sells any and all of their parts for holiday detectors.

Q. Does the sale of parts constitute a substantial part of the business of Tinker and Razor?

* * *

A. (The Witness) It constitutes a sizeable portion.

Q. (By Mr. Gregg) Percentagewise, could you state about how much of your business is accounted for by the sale of parts as distinguished from complete detectors?

A. As I recall, looking at the figures for 1951's business, I believe we sold — or taking again the total gross of our 1951 sales, I recall that approximately 10 or 12 or 15 per cent, in that order, were for parts.

Q. And the balance being complete detectors.

A. And the balance being complete detectors.

Q. Have you recently consulted your records to verify this, Mr. Razor?

A. I have done so.

Q. Have you ever sold any parts for use in conjunction with D. E. Stearns holiday detectors?

A. Not that I am aware of.

* * *

Q. Can you give me any reason, as far as you know, that you have never sold any parts for D. E. Stearns holiday detectors?

A. Well, I would assume that somebody using a D. E. Stearns holiday detector would be renting it and they certainly would not buy any parts from us for something they don't own.

Mr. Browning: I move to strike the witness' answer.

The Court: It may go out, on the ground that it is an assumption.

Q. (By Mr. Gregg) What parts could you supply for a D. E. Stearns Company detector?

A. Well, a pusher could be attached to the high voltage lead coming out of a detector or an electrical connection made with it and it could be used in the same fashion as our Model C-3 holiday.

Q. In other words, would you use a platform or carriage containing electrical apparatus, dispense with the bracket type of pusher and use the wand type of pusher of the defendant Tinker & Razor such as shown, I believe it is Plaintiffs' Exhibit 26-A?

A. The Witness: That is correct."

(Repeated questions and exchanges between Court and counsel omitted to give continuity of actual testimony).

From the above testimony, the following facts are ascertained and these only:

1. Defendants have only sold their parts for their detectors.

2. Razor, for some unaccounted-for reason, is not "aware" of the corporation's having sold parts for Plaintiffs' holiday detectors.

3. Defendants' "could supply a battery, an electrode, possibly a ground wire, a pusher."

This testimony fails to show:

1. Defendants have been prepared to sell parts for Plaintiffs' holiday detectors.
2. Defendants intended to sell parts for Plaintiffs' detectors.
3. Defendants ever made any effort to sell parts for Plaintiffs' detectors.
4. Positive proof whether Defendants did or did not actually sell parts for Plaintiffs' detectors.
5. Any proximate relationship between Plaintiffs' alleged violations of the antitrust laws and Defendants' failure to sell parts for Plaintiffs' detector, *if* they had not.
6. Any probability that customers of Stearns' place of business in Shreveport, Louisiana, would go to San Gabriel, California, to Defendants' place of business for parts for machines obtained from Plaintiffs.

The Court in *Triangle Conduit and Cable Co. v. National Electric Products Corporation*, 152 F. 2d 398 (C.A. 3, 1945), *supra*, considered a very similar situation and granted a summary judgment against the alleged injured party. In that case the Plaintiff, because of Defendant's actions in violation of the antitrust laws, had been forced to buy a machine for fabricating fiber bushings for use in spiral conduits for electrical cable. Plaintiff's only claim for damage was upon the contention "that it has been excluded from the 'potential market' for its bushing. That market is represented by the defendant's licensees who, because of their agreements with the defendant, were prevented from acquiring bushings from anyone other than the defendant."

The Court, in affirming the summary judgment for the Defendant, stated:

"The foundation of the action as it stands is Section 4 of the Clayton Act, 15 U.S.C.A. 15. That section provides that where any person is injured in his business or property by reason of anything forbidden in the anti-trust laws he may sue and recover treble damages. Under it, our concern is with the question of the alleged exclusion of plaintiff from selling its bushings in the so-called 'potential market.' As to this, the amended complaint and the depositions are barren of any indication of even intention on the part of the plaintiff to manufacture bushings for said market. * * * It is obvious from their testimony that plaintiff never suggested or attempted entering into the business of selling its bushings to outsiders. * * * There is nothing to indicate that the plaintiff made any preparatory step whatsoever towards going into a general bushing manufacturing business. The section of the anti-trust laws above referred to has the limited purpose of affording compensation to those who have at least the intention and preparedness of engaging in a designated business and who are actually injured in their business or property by an unlawful act. The situation of such plaintiff must be different from that of the general public."

In the cases cited by Defendants, there was substantial evidence to show the fact of damage to a business or property as the result of acts violative of the antitrust laws. It is this fact of damage, as a result of Plaintiffs' antitrust violations, that Defendants have not proved and which precludes them from recovering. The fact of damage cannot be speculative or conjectural. In *Twentieth Century-Fox Film Corp. v. Brookside Theater Corp.*, 194 F. 2d 846, 955, *supra*, it is stated:

“The measure of such damages is the pecuniary loss to plaintiff’s business or property resulting proximately from the conspiracy or combination. They must be actual damages and not speculative or conjectural. The uncertainty, however, which precludes the recovery of particular damages is uncertainty as to whether they are the result of the tortious acts of defendants * * *. *Bigelow v. R. K. O. Radio Pictures*, 327 U.S. 251 * * * *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 * * *.”

B. The award of cost to Plaintiffs for their successful first appeal followed this Court’s mandate and was not error.

The costs under dispute are those provided for in the mandate of this Court where the judgment of invalidity of the Stearns patent as lacking invention was reversed upon Plaintiffs’ first appeal. (Mandate, R. 913) The award of costs in the mandate was pursuant to Rule 25 of the rules of this Court, which reads in Section 3 as follows:

“In cases of reversal of any judgment or decree in this Court, costs shall be allowed the appellant, including the cost of the transcript from the record below, unless otherwise ordered by the Court.”

The charge that the trial court erred in following this Court’s mandate, obviously has no support in law because the lower court has no alternative but to follow the mandate of the Court of Appeals.

The Court of Appeals of the Second Circuit in *Broffe v. Horton*, 173 F. 2d 565, had before it a petition for amendment of mandate of the Court of Appeals to make the costs of appeal abide the event of the action. The Per Curiam decision of Judges L. Hand, Chase, and Frank is

quite pertinent to Defendants' attempt to have the costs on the first appeal abide the event:

"The rules of the Supreme Court have provided for more than a hundred years that in case of reversal, costs shall be allowed 'unless otherwise ordered by the court.' That is now embodied in Rule 32(3) of the rules of that court, 28 U.S.C.A.; and our own Rule 30(2) is even stronger: 'costs, so far as taxable, shall be allowed *as of course* to the prevailing party unless the course (sic) otherwise directs'. No doubt that allows exceptions, but from the beginning in 1891 it has been the unbroken practice at least in this circuit, so far as we know, or can learn from the clerk's office, never to allow 'costs to abide the event' in case of reversal; and we gather that that is the rule elsewhere. The only exception we can find is *United States v. Beatty* in which in 1847 Justice Daniel and Johnson, D. J., awarded 'costs (to) abide the event,' because 'it was the error of the court' which had rendered a new trial necessary.

'We regard our local practice as an almost conclusive gloss upon the rule; * "

In the Fifth Circuit, in *Seeley, et al., v. Hunt, et al.*, 109 F. 2d 595, after an appeal the costs were divided, including a division of the cost of the transcript of the first appeal. The Court speaking through Judge Hutcheson, stated at Page 597:

"In the decree the court taxed the sum of \$75.30 as costs of the former appeal against the respondents and further decreed that all other costs be taxed one half against the complainants and one half against the respondents. This will not do. It was error for the reason that the complainants were taxed with one half the cost of the transcript of record on the former appeal. In the mandate the respondents, appellees, were con-

demned to pay the costs of the appeal. Moreover, our Rule 31(3) provides, 'In cases of reversal of any judgment or decree in this court, costs shall be allowed to the appellant unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case'. The respondents were liable for all costs of the appeal and these costs included the cost of the transcript of record. *City of Orlando v. Murphy*, 5 Cir., 94 F. 2d 426."

In the decision of *City of Orlando v. Murphy*, C.A. 5, 94 F. 2d 426, the case was quite similar to that at bar in that the mandate ordered further proceedings not inconsistent with the Court's opinion. At Page 432 of the report, Judge Hutcheson pointed out that the plaintiff, prevailing in part after the first appeal, was entitled by statute to all of the costs in the court below inasmuch as it was a case at law. However, the court then continued as follows:

"But the costs of suit the statute gives are those accruing in the District Court. Such as accrue by reason of an appeal are not included. These are costs of appeal. They follow the judgment on appeal. On the former appeal to this court the City of Orlando obtained a reversal with a mandate ordering 'that the appellee, W. T. Murphy, be condemned to pay the costs of this cause in this court, for which execution may be issued out of the District Court'. * * * This then is the practice; the costs of appeal to this court are imposed by order of this court, those due or already paid to or through its officers are here taxed and included in the mandate, the cost of the transcript and any other properly taxable appeal costs are to be ascertained and 'taxed' in the District Court on the coming down of the mandate."

Other pertinent cases supporting the award of costs upon the first appeal to Plaintiffs, are:

Jennings, et al. v. Burton, 177 F. 603;
Troxell v. Delaware, L. & W. R. Co. (District Court,
 E.D. Pennsylvania, 1913), 205 F. 830, 832;
Land Oberoesterreich v. Gude, et al., C.A. 2 (1937),
 93 F. 2d 292.

Conclusion

It is submitted that the trial Court properly denied the Defendants' counterclaim because of lack of proof of an injury to Defendants' business or property as the *certain* result of Plaintiffs' alleged violation of the antitrust laws. Proof of such injury is required by statute which is the basis of such a suit and the fact of damage must not be speculative or conjectural.

Plaintiffs' and Defendants' businesses being located in Shreveport, Louisiana, and San Gabriel, California, respectively, it would take clear, cogent and convincing evidence on the part of Defendants to prove such damage. Obviously there is not clear error on the part of the trial Court in dismissing the counterclaim.

As to the matter of cost the District Court had no alternative but to follow the mandate of the Court of Appeals.

Respectfully submitted,

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In the

United States Court of Appeals

For the Ninth Circuit

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RASOR and LEO H. TINKER,

Appellants-Appellees.

Brief of Tinker & Rasor, John P. Rasor and Leo H. Tinker in Answer to Plaintiffs' Opening Brief

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FILED

OCT - 2 1956

PAUL P. O'BRIEN, CLERK

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In the
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DICK E. STEARNS and THE D. E. STEARNS
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Appellants-Appellees.

**Brief of Tinker & Rasor, John P. Rasor
and Leo H. Tinker in Answer to
Plaintiffs' Opening Brief**

INTRODUCTION

The pleadings, history of this case, jurisdiction and parties are correctly set forth in "Plaintiffs'-Appellants' Brief on Second Appeal" (the white covered brief, filed on or about August 21, 1956). Such brief is referred to hereinafter as "Plaintiffs' Brief."

Certain terms will be used for convenience in this brief as follows:

"Plaintiffs" is used to designate the parties Dick E. Stearns and The D. E. Stearns Company.

"Defendants" is used to designate the parties, Tinker & Rasor, John P. Rasor and Leo H. Tinker.

"Stearns Patent" is used to designate United States Letters Patent No. 2,332,182, which is the patent upon which suit is brought.

Throughout this brief, where italics appear in quotation, the emphasis is added except where otherwise stated. Also, matter appearing in quotations which is enclosed by brackets is added.

STATEMENT OF THE CASE

The complaint alleges infringement of Claims 1 and 7 of the Stearns Patent (R. 4 and 5, Paragraphs V and VI of Complaint). Infringement by the individual Defendants John P. Rasor and Leo H. Tinker is admitted but is denied as to the corporate Defendant Tinker & Rasor.

The Stearns Patent is directed to certain parts or components of a holiday detector. The purpose of a holiday detector is correctly stated in Plaintiffs' Brief, pages 4 and 5. The components covered by Claim 1 are an electrode and a pusher and those covered by Claim 7 are the electrode and pusher in combination with a carriage which rolls on the pipeline.

The issue of infringement as to Claim 1 is whether the pusher employed by the corporate Defendant Tinker & Rasor, which is in evidence as Pls.' Exh. 26A and is depicted in "Exhibit D" appended to Plaintiffs' Brief, is a means "rotatably engaging" the electrode (Pls.' Exh. 26C, colored yellow in "Exhibit D"). The significance of the quoted language is that it was inserted in Claim 1 by amendment; it was deemed by the District Court to be ambiguous; and it was interpreted by the District Court in the light of statements in the Stearns Patent and testimony of witnesses at the trial to restrict Claim 1 to a pusher with wheels or rollers, such as used by Plaintiffs. (See "Exhibit C" appended to Plaintiffs' Brief). Defendants' pusher, Pls.' Exh. 26A, does not employ wheels or rollers; hence the District Court found no infringement.

The District Court's findings regarding Claim 1 are Findings Nos. 16-37, R. 918-925.

As to Claim 7 the issue of infringement is whether that claim may be construed to cover a combination of a rolling coiled spring electrode, a carriage on wheels which rolls along a pipeline and a pusher which is connected to the carriage only by a flexible electric cable and which requires the hand of a human operator applied directly to the pusher in order to propel the electrode. The District Court (Findings Nos. 38-45, R. 925, 926) held that Claim 7 may not be so construed and held no infringement of Claim 7 by defendants device, Pls.' Exhs. 26A, 26B and 26C.

In addition to the defense of noninfringement, Defendants assert the defense of misuse of the Stearns Patent by Plaintiffs (Paragraphs XIII, XIV and XV of Answer, R. 11, 12). The facts upon which the District Court sustained the defense of misuse are briefly as follows:

The Stearns Patent is for a part only of a holiday detector, the remaining unpatented part being the electrical high voltage generating and signalling apparatus which accounts for the major part of the cost of a detector and which is separable and divisible from the patented part. Plaintiffs will lease, but refuse to sell, their detectors and they will not lease or sell parts of their detectors although they will supply replacement parts for leased detectors (Findings Nos. 46-53, R. 926-928). The District Court found (Findings Nos. 54, 55, R. 928) that the actual realistic effect of this policy is to tie the unpatented part to the patented part and to restrain trade in parts of holiday detectors.

A subsidiary phase of the misuse aspect of the case is that Plaintiffs license the Stearns Patent but upon conditions so onerous, as found by the District Court (Findings Nos. 57-60, R. 929) as to achieve the same result, i.e., a tie-in of patented apparatus with unpatented apparatus.

Conclusion of Law No. III (R. 930) summarizes the legal conclusions drawn by the District Court regarding misuse, that Plaintiffs' policy (leasing and licensing) is an unlawful misuse of the Stearns Patent because it uses the patent "to monopolize and to restrain competition in unpatented materials".

SUMMARY OF ARGUMENT

I. There Exist Both Expansive and Restrictive Rules of Claim Interpretation. Where the Facts Call for Application of a Restrictive Rule, It Prevails Over an Expansive Rule.

The burden of proving infringement is on the plaintiff. He must prove infringement of a *claim* of a patent; there is no such thing as infringement of a "patent".

To aid a patentee there are certain expansive rules of claim interpretation, such as the doctrine of equivalents under which a claim may be construed more broadly than its literal meaning. But such expansive rules must give way to certain restrictive and controlling rules where the facts call for the latter. An example of a controlling, restrictive rule is the rule of file wrapper estoppel; that a claim once narrowed by amendment must be construed strictly and may not invoke the doctrine of equivalents. Also, not even the broadest claim of a patent may be construed more broadly than the actual invention. Also, where a patent clearly shows that no alternative construction is contemplated, it is not permissible to adopt a contrary interpretation of a claim.

Plaintiffs seek to invoke only the expansive rules of claim interpretation. The District Court carefully considered and properly applied all of the pertinent rules.

II. The District Court Properly Construed Claim 1 in the Light of the Facts and the Legal Rules of Claim Interpretation as Being Limited to a Pusher with Wheels or Rollers.

Claim 1 defines the pusher element as "rotatably engaging" the electrode. This language was inserted by amendment, hence re-

stricts the claim to those pushers which “rotatably engage” the electrode. The meaning of this phrase is clarified by the patent itself, which emphasizes wheels on the pusher and says that these wheels are driven or, if not driven, must rotate easily. This interpretation is confirmed by Stearns’ experimentation with and abandonment of a wheelless pusher. Defendants’ device, Pls.’ Exhs. 26A and 26C, employs a wheelless pusher; hence does not infringe.

III. The District Court Properly Construed Claim 7 in the Light of the Facts and the Legal Rules of Claim Interpretation as Being Limited to a Device in Which the Pusher Is Rigidly Fixed to the Carriage.

Claim 7, which is conceded by Plaintiffs to be a lesser claim, is for a device in which the pusher and carriage are so related that “movement of said carriage longitudinally along a member [pipe] to be tested will cause a rolling movement of said electrode along such member”. This is not true of Defendants’ device, Pls.’ Exhs. 26A, 26B and 26C, which requires a human operator to push the electrode while pulling the carriage. The carriage is rolled on the pipe merely for convenience and its movement is independent of movement of the electrode. Plaintiffs’ contention that the human operator supplies the operating connection is absurd. If Claim 7 is interpreted that broadly, then it is invalid for failure to particularly point out and distinctly claim the invention.

IV. Plaintiffs Seek an Interpretation of Claims 1 and 7 Which Would Give Them a Monopoly of a Result Rather Than a Monopoly of a Means of Accomplishing a Result.

Plaintiffs seek to give a fantastically broad interpretation to Claim 7; they deny the plain meaning of the phrase “rotatably engaging” in Claim 1; and assertions in their brief show that they deliberately ignore other express limitations in Claims 1 and 7 in order to embrace several other types of holiday detector. Mr. Simms frankly stated to the District Court that their claims cover

everything that will accomplish the same result. Plaintiffs seek to monopolize a result, not just a means of accomplishing a result. Under the patent laws this is not permissible.

V. The District Court Properly Found That Plaintiffs Have Misused Their Patent.

A. FINDINGS NOS. 46-55 PROPERLY HOLD THAT PLAINTIFFS' PRACTICE OF LEASING ONLY A COMPLETE DETECTOR; OF REFUSING TO SELL; AND OF REFUSING TO SELL OR RENT PARTS OF DETECTORS, IS AN UNLAWFUL ATTEMPT TO EXTEND THE MONOPOLY OF THE PATENT TO UNPATENTED MATERIALS.

The District Court properly found that the Stearns Patent covers only a part of Plaintiffs' detector; that the unpatented part is separable and divisible from the patented part; and that the unpatented part accounts for the major portion of the cost of a detector. The District Court also properly found that Plaintiffs follow an exclusive leasing policy under which persons who desire to use the patented apparatus must take it with and pay for unpatented apparatus. It is not possible for members of the public to obtain from Plaintiffs title to one of their detectors by purchase, or to obtain parts of detectors except as replacement parts for leased devices. The inevitable effect of this policy is to extend the monopoly of the patent to unpatented materials.

B. THE DISTRICT COURT PROPERLY APPLIED THE LAW OF MISUSE TO FINDINGS NOS. 46-55. ANY DIFFERENCE BETWEEN PLAINTIFFS' PRACTICE AND POLICIES CONDEMNED HERETOFORE IS WITHOUT LEGAL SIGNIFICANCE.

Plaintiffs, in their brief, point to certain alleged differences between their practice and practices condemned in prior cases. It is submitted that the facts of the present case are on all fours with at least one recent case, *Cardox Corp. v. Armstrong Coalbreak Co.*, 194 F.2d 376, C.A. 7 (1952), cert. denied 343 U.S. 979. Moreover, a study of the cases on patent misuse shows zeal and ingenuity on the part of patentees to avoid the appearance without avoid-

ing the spirit of wrongdoing, and they also show an equal zeal on the part of the courts to regard such evasive conduct as being without legal significance and as mere attempts to conceal unlawful monopolistic practices.

C. FINDINGS NOS. 57-60 PROPERLY HOLD THAT PLAINTIFFS' LICENSING POLICY IS NOTHING MORE THAN AN EXTENSION OF THEIR UNLAWFUL LEASING POLICY AND IS AN ATTEMPT TO FORCE PLAINTIFFS' LICENSEES TO DO BUSINESS IN THE SAME UNLAWFUL WAY AS PLAINTIFFS.

Plaintiffs offer one form of license to sell the patented electrode-pusher combination and another form of license to lease the patented electrode-pusher combination. However, the royalty required to be paid is \$250.00. The item itself sells in commerce for about \$22.50. Accordingly, it would be impossible either to sell or lease the patented combination alone under a license from Plaintiffs. A licensee would, of necessity, have to follow the same policy as Plaintiffs, namely, selling or leasing the patented combination only with complete detectors.

VI. A Reply to Miscellaneous Assertions in Plaintiffs' Brief.

- A. PLAINTIFFS ERRONEOUSLY DESCRIBE THE WHEELS OR ROLLERS OF THE STEARNS PUSHER AS A BEARING. THAT TERM IS NOT SO USED IN THE PATENT AND WAS NOT INTENDED BY STEARNS TO DESCRIBE THE WHEELS OR ROLLERS OF HIS PUSHER.**
- B. PLAINTIFFS ERRONEOUSLY CONTEND THAT, AS TO THE ISSUE OF INFRINGEMENT, ONLY QUESTIONS OF LAW EXIST.**
- C. PLAINTIFFS SUGGEST THAT THE CRITERION OF INFRINGEMENT IS A COMPARISON OF THE DEFENDANTS' STRUCTURE WITH SOMETHING OTHER THAN THE CLAIMS OF THE PATENT. THIS IS NOT THE PROPER CRITERION OF INFRINGEMENT.**
- D. PLAINTIFFS RELY UPON CERTAIN GENERAL STATEMENTS IN THE STEARNS PATENT TO GIVE THE INVENTION A BROAD CHARACTERIZATION. THESE GENERAL STATEMENTS MUST BE READ IN THE LIGHT OF RELATED SPECIFIC STATEMENTS. SO READ, THE GENERAL STATEMENTS ARE NOT A RELIABLE CRITERION OF THE BREADTH OF THE INVENTION.**
- E. PLAINTIFFS ERRONEOUSLY CONTEND THAT THE ARGUMENT OF THE PATENT SOLICITOR IN AMENDING CLAIM 1 SUPPORTS THEIR INTERPRETATION OF CLAIM 1.**
- F. PLAINTIFFS POINT TO THE FACT THAT CLAIM 1 RECITES "MEANS ROTATABLY ENGAGING", WHEREAS CLAIM 2 RECITES "ROLLERS", AND THEY RELY UPON THE RULE THAT A GENERIC CLAIM WILL NOT ORDINARILY BE CONSTRUED TO INCLUDE THE LIMITATION OF A MORE SPECIFIC CLAIM. BUT PLAINTIFFS NEGLECT TO STATE THE CONTROLLING RULE THAT NO CLAIM MAY EXCEED THE ACTUAL INVENTION.**
- G. CASES RELIED UPON BY PLAINTIFFS ON THE ISSUE OF MISUSE ARE DISTINGUISHABLE.**

ARGUMENT

- I. There Exist Both Expansive and Restrictive Rules of Claim Interpretation. Where the Facts Call for Application of a Restrictive Rule, It Prevails Over an Expansive Rule.**

The complaint alleges infringement of Claims 1 and 7 of the Stearns' Patent (R. 4, 5). The burden of proving infringement is on the Plaintiffs. *Magnavox Co. v. Hart & Reno*, 73 F.2d 433, 434, C.A. 9 (1934).

Only a claim of a patent can be infringed; it is the claims of a patent which measure the scope of the patent monopoly. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 419, 52 L.Ed. 1122, 1128 (1908); *White v. Dunbar*, 119 U.S. 47, 51,

52; 30 L.Ed. 303, 305 (1886). As stated in "Walker on Patents", Deller's edition, page 1681:

"Strictly speaking, infringement of a patent is an erroneous phrase; what is infringed are the *claims of the patent* which '*measure the invention*' and define precisely what the invention is, and the limits beyond which one cannot pass without infringing; therefore it is to the claims of the patent to which one must look to determine whether there is an infringement." (Emphasis in the original.)

Certain well established rules exist for interpreting a patent claim. One rule is that a claim must be read in the light of the description and drawings, especially where the claim is ambiguous. *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211, 217; 85 L.Ed. 132, 135, 136 (1940); *Snow v. Rwy. Co.*, 121 U.S. 617, 630; 30 L.Ed. 1004, 1008 (1887); *Stuart Oxygen Co. v. Josephian*, 162 F.2d 857, 860, 861, C.A. 9 (1947); *Kugelman v. Sketchley*, 133 F.2d 426, 427, C.A. 9 (1943).

Another rule is the rule or doctrine of equivalents, to wit, that a patent claim may be construed to cover a structure which employs a different element than called for by the claim, provided the different element is an equivalent of the element called for by the claim. One element is the equivalent of another if it does the same work in substantially the same way and accomplishes the same result. *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 42; 74 L.Ed. 147, 156 (1929); *Graver v. Linde*, 339 U.S. 605, 608; 94 L.Ed. 1097, 1102 (1950).

Also, if a patent contains both a broad claim and a narrow claim, ordinarily the broad claim will not be given as restricted an interpretation as the narrow claim. *Kemart Corp. v. Printing Arts Laboratories*, 201 F.2d 624, 633, C.A. 9 (1953).

Certain of the above rules of claim interpretation are favorable to the patentee and are calculated to protect his invention. These may be called "expansive" rules. These rules are relied upon by the

Plaintiffs. There are, however, certain restrictive rules of claim interpretation. The courts have held that, where the facts call for application of a restrictive rule, it prevails over the expansive rules. The fact that there are restrictive rules of claim interpretation and that they prevail over the expansive rules is reasonable. A patent grants to the patentee for a period of 17 years a monopoly which is secured through an *ex parte* proceeding in the Patent Office. Individual members of the public are not privileged to be represented in this proceeding. It is also just and reasonable that certain restrictive rules of claim interpretation should be invoked in appropriate cases, because patentees are forever seeking to stretch the scope of their patents beyond reasonable limits. As long ago as 1886, the Supreme Court in *White v. Dunbar*, 119 U.S. 47, 51; 30 L.Ed. 303, 305, observed of patentees that:

"Some persons suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express."

Patentees have rights; so also do persons whom they sue and so does the public at large. Courts should be at least as zealous in protecting the rights of the public from inventors who over-claim their inventions, as in protecting the rights of inventors from too narrow and restrictive an interpretation of their claims.

One of the prevailing, restrictive rules of claim interpretation is the rule of file wrapper estoppel. When the facts show file wrapper estoppel, the doctrine of equivalents has no application. The rule of file wrapper estoppel is this: Where a broad claim is presented to the Patent Office and is rejected, and the applicant then amends the claim to narrow it in order to secure allowance, thereafter the amended, narrowed claim must be construed strictly and the doctrine of equivalents does not apply. This rule is stated

in *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 136; 86 L.Ed. 736, 744 (1942), as follows:

“Assuming that the patentee would have been entitled to equivalents embracing the accused devices had he originally claimed a ‘conductor means embedded in the table,’ a very different issue is presented when the applicant in order to meet objections in the Patent Office, based on references to the prior art, adopted the phrase as a substitute for the broader one ‘carried by the table.’ Had Claim 7 been allowed in its original form, it would have read upon all the accused devices, since in all the conductor means complementary to the coil spring are ‘carried by the table.’ By striking that phrase from the claim and substituting for it ‘embedded in the table’ the applicant restricted his claim to those combinations in which the conductor means, though carried on the table, is also embedded in it. By the amendment, he recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference. The difference which he thus disclaimed must be regarded as material, and since the amendment operates as a disclaimer of that difference it must be strictly construed against him. As the question is one of construction of the claim it is immaterial whether the examiner was right or wrong in rejecting the claim as filed. It follows that what the patentee, by a strict construction of the claim has disclaimed—conductors which are carried by the table but not embedded in it—cannot now be regained by recourse to the doctrine of equivalents, which at most operates, by liberal construction, to secure to the inventor the full benefits, not disclaimed, of the claims allowed.” (Citations omitted.)

In *Dixie Cup Co. v. Paper Container Mfg. Co.*, 169 F.2d, 645, 648, C.A. 7 (1948) the Court said that “the change effected by the amendment must be construed against the patentee.”

Another restrictive rule is that no patent claim, however broad, may be construed more broadly than the invention. This Court has

said recently in *Kemart Corp. v. Printing Arts Laboratory*, 201 F.2d, 624, 629:

"At any rate, the fact that the claims of the Marx patent are broad enough to cover appellant's process does not establish infringement. The claims are to be read in connection with the specification, and a patentee's broadest claim can be no broader than his actual invention."

The Court applied this rule notwithstanding the fact it assumed "that the process of the Marx Patent is a meritorious invention, entitled to a relatively broad range of equivalents" (201 F.2d, 629).

It is thus apparent that a claim must be construed in the light of the specification and that it may not be construed more broadly than the actual invention. A corollary of these rules of claim construction is that, where a patentee in his specification has demonstrated that he contemplates no alternative for a given construction, he will not be heard later to contend that his claim contemplates something else. This situation arose in *Snow v. Railway*, 121 U.S. 617, 30 L.Ed. 1004 (1887). The patentee in that case contended that the trial court had construed his patent too narrowly; that something described as essential in the patent was not essential at all. The court remarked (121 U.S. 630):

"It is not admissible to adopt the argument made on behalf of the appellants, that this language is to be taken as a mere recommendation by the patentee of the manner in which he prefers to arrange these parts of his machine. There is nothing in the context to indicate that the patentee contemplated any alternative for the arrangement of the piston and piston rod. The arrangement of the valves, as shown in the drawings, he declared not to be essential, and explained how they might be otherwise adjusted * * * but no such language is used in reference to the connection between the piston and its rod."

All of these rules were carefully considered and were properly applied by the District Court to the facts in the case at bar, as will now be shown.

II. The District Court Properly Construed Claim 1 in the Light of the Facts and the Legal Rules of Claim Interpretation as Being Limited to a Pusher with Wheels or Rollers.

Claim 1 is for an electrode in the form of a coiled spring, in combination with a pusher element for contacting the electrode electrically and for rolling the electrode along a pipe. Plaintiffs in their Brief properly contend that the point at issue is the meaning of the language, "means rotatably engaging", as used in Claim 1 to define the pusher element.

Finding No. 19 (R. 919, 920) sets forth the conflicting contentions of the parties and illustrates this conflict by the conflicting testimony of the witness Lee (for Plaintiffs) and the witness Peterson (for Defendants). Examples of that conflicting testimony will be found at R. 309 and 519-523.

Finding No. 20 (R. 920) explains the significance of this conflict and pinpoints the issue as the meaning of the phrase "rotatably engaging"; whether the phrase does or does not limit the patented pusher to one with wheels or rollers. If limited to wheels or rollers, then Claim 1 is not infringed by Pls.' Exhs. 26A, 26B and 26C. If Claim 1 is not so limited, then it is infringed. This is admitted in Plaintiffs' Brief, page 7, 3rd paragraph.

Finding No. 21 (R. 920, 921) states the fact that the language "rotatably engaging" was not present in Claim 1 (originally Claim 3 of the application) as filed but was added by amendment. This fact is shown by the file wrapper, Defs.' Exh. L (a physical exhibit) pages 12 and 24; it was testified to by Peterson (R. 523-526); and it is illustrated by interlineation in Defs.' Exh. HH (R. 782). There is no dispute that the "means forming a movable electrical contact with said spring" of Claim 1 (Claim 3 of the

application) as originally filed was further and more specifically defined as "means *rotatably engaging and* forming a movable electrical contact with said spring." Nor is there any dispute that this amendment was made to overcome the objection of the Patent Examiner that the original claim was "indefinite and incomplete" and was unpatentable over prior art. (File wrapper of the Stearns' Patent, Defs.' Exh. L., pages 22 and 24.)

Bearing in mind that a patent claim is to be read in the light of the specification and drawings, particularly when the claim is ambiguous, it was quite proper for the District Court to refer in Findings Nos. 24 to 27 (R. 921, 922) to the specification and drawings of the Stearns Patent. Finding No. 24 is that, in Fig. 10, the pusher element is equipped with wheels 44 and 45 in contact with the electrode and wheels 46 and 47 in contact with the pipe and with the wheels 44 and 45; and that in Fig. 15 only wheels 68 and 69 in contact with the electrode are employed. Finding No. 25 is that the specification of the patent states that the function of wheels 46 and 47 is to serve as friction wheels in contact with the pipe and with wheels 44 and 45 "so that when the device is moved along the pipe, the wheels 44 and 45 will be made to rotate." Finding No. 26 refers to the fact that in the specification of the patent at page 3 (R. 760), column 1, lines 4 to 27, another form of pusher is described. The patent states:

"* * * It has been found that under many circumstances the use of the wheels 46 and 47 is unnecessary and under such circumstances these are omitted as shown in Fig. 15. In this figure the brackets 66 and 67, which correspond to the brackets 38 and 39, are not provided with a means for mounting wheels such as 46 and 47. They are provided, however, with mountings for wheels 68 and 69, corresponding to the wheels 44 and 45, which wheels are adapted to engage on opposite sides of the electrode 56 and provide electrical contact therewith, as well as to move said electrode along the pipe. When the wheels 46 and 47 are employed, it will be

seen that they tend to rotate the wheels 44 and 45 and that rotation of these wheels is transmitted by friction to the electrode 56 tending to rotate the same as well as to push it forward. Where the wheels 46 and 47 are not employed, as in Fig. 15, the knurling 55 may be omitted so that the wheels 68 and 69 might be perfectly smooth if desired. Wheels 68 and 69 must rotate easily to cause proper propulsion of the electrode while permitting it to rotate.”

There can be no dispute with Finding No. 26. The next finding, No. 27 (R. 922), states that the language quoted in Findings Nos. 25 and 26 is “the only language contained in the Stearns Patent which explains or clarifies the meaning of the phrase ‘rotatably engaging’ in Claim 1.” Plaintiffs, in their Brief, rely upon general, ambiguous language which in fact means nothing at all and which does not clarify the ambiguity in the phrase “rotatably engaging.”¹

The Stearns Patent does indeed contemplate alternatives to several of the elements of construction. Thus, the driving wheels 44 and 45 may or may not be employed at the option of the user. But the patent does not contemplate any alternative for wheels which make contact with the electrode.

If the driving wheels 46 and 47 are omitted, then, in accordance with the patent at page 3, column 1, lines 8 to 16:

“* * * the brackets 38 and 39, are not provided with a means for mounting the wheels 46 and 47. They [i.e., the brackets 38 and 39] are provided, however, with mountings for wheels 68 and 69, corresponding to the wheels 44 and 45, which wheels are adapted to engage on opposite sides of the electrode 56 and provide electrical contact therewith, as well as move said electrode along the pipe.”

Only one inference can be drawn from this language, to wit, that the driving wheels 46 and 47 may be omitted, but *wheels contact-*

1. This point is dealt with *infra*, pages 45 to 46.

ing the spring electrode may not be omitted. Note also that in the construction of Fig. 15, the springs 42 and 43 are retained which press the wheels 68 and 69 against the electrode.

The patent specification goes on to state that, when wheels 46 and 47 are employed "they tend to rotate the wheels 44 and 45 and that rotation of these wheels [44 and 45] is transmitted by friction to the electrode 56 tending to rotate the same as well as to push it forward" (Page 3, col. 2, line 16-21).

It is plain that Stearns contemplated that rotation of the wheels 44 and 45 [which is caused by the driving wheels 46 and 47] rotates the electrode.

Significantly, the patent then states:

"Where the wheels 46 and 47 [i.e., the driving wheels] are not employed, as in Fig. 15, the knurling 55 may be omitted so that the wheels 68 and 69 might be perfectly smooth if desired."

Note the alternative contemplated; wheels 68 and 69, if used, may be knurled or they may be smooth if desired.

Concluding this paragraph is the very significant sentence which Plaintiffs have never been able to explain away:

"WHEELS 68 AND 69 MUST ROTATE EASILY TO CAUSE PROPER PROPULSION OF THE ELECTRODE WHILE PERMITTING IT TO ROTATE."

Plainly, wheels 68 and 69 [without driving wheels 46 and 47] are an alternative to wheels 44 and 45 [which employ the driving wheels], and the wheels 68 and 69 may be knurled or they may be perfectly smooth. *However, the wheels 68 and 69 must rotate easily.*

Plaintiffs expert witness Lee was cross-examined on this precise point (R. 333, 334). He was asked whether the statement quoted above is a "statement, Mr. Lee, that the wheels 68 and 69 must rotate" (R. 333, last question). His answer (R. 333, 334) was

involved, to say the least, and was to the effect that "if you are going to use a roller bearing, it makes good sense that the roller bearing be able to roll." Again, at R. 334, Lee was asked

"Q. Suppose, Mr. Lee, that I employed something to stop the rotation of the wheels 68 and 69 altogether, would I then obtain proper propulsion of the electrode?"

Lee's answer (R. 334, last answer) was involved and evasive and was, in substance, as follows:

"* * * *if you are going to bother to go to the expense and trouble to use a roller*, then the thing ought to roll * * * If you are going to use a sleeve bearing, why, it is generally advantageous to have more area in contact."

Note that a "roller" is viewed by Lee as a "bother" and as an "expense and trouble"! Yet the Stearns Patent describes only wheels or rollers; it states that in one form the wheels are driven; and it emphasizes that in another form the wheels need not be driven but "must rotate easily to cause proper propulsion of the electrode".

Plainly, Finding No. 27 is correct in holding that the language "rotatably engaging" in Claim 1 means that the pusher must have wheels or rollers which must be driven or, if not driven, must rotate easily. Plainly Plaintiffs have failed, notwithstanding the valiant efforts of their expert witness, to sustain their burden of proving a contrary and broader meaning.

In *Snow v. Railway*, 121 U.S. 617, 630; 30 L.Ed. 1004, 1008, the Supreme Court pointed out that the patentee contemplated alternatives for certain elements but none for the vital elements upon which the issue of infringement turned. That is the exact situation in the case at bar.

Plaintiffs in the case at bar rely upon the rule that a patentee need not describe all alternatives. This is conceded. But Plaintiffs overlook the rule that, if a patent contains language which ex-

cludes an alternative (e.g., wheels which are not driven and which do not rotate easily), then "It is not admissible to adopt the argument * * * that this language is to be taken as a mere recommendation * * *" (*Snow v. Railway*, supra).

Finding No. 27 is amply supported by the record discussed above. Moreover, it is strongly confirmed by the testimony of the plaintiff Stearns, as set forth in Findings Nos. 28 to 32 (R. 922, 923). The substance of these findings is that, prior to filing his application for patent, Stearns experimented with a pusher which had no wheels or rollers but found it to be unsatisfactory, discarded it and never used it again. This pusher is depicted in Defs.' Exh. B (R. 762), which is a pencil sketch made by Stearns at the trial (R. 112-114). Experiments with this pusher demonstrated that it would roll a spring but (R. 89, 90):

"* * * I [Stearns] particularly noted that, with the hand pusher block down over the top of the spring, that each time you reversed direction of the spring, that is going from forward to backward motion, that there was a break in contact between the spring and one of the metal contacts on either side, whichever it might be, and then decided that there would have to be some means of articulation furnished."

Stearns further explained (R. 90) that this flaw in the block type pusher would result in "a registration of both the light and bell signal which would be false."

Stearns was cross-examined concerning this abortive block-type pusher (R. 112-115), at which time the sketch, Defs.' Exh. B, was made. Stearns testified that he never conducted electric current to a spring with this type of pusher (R. 115); that is, he never used it in a holiday detector. He further testified that, after these experiments, he "Never used it [the block-type pusher] again." (R. 115)

This was testimony taken in open court by one of the plaintiffs, the inventor himself. The District Court heard the testimony from

the lips of the witness and observed his demeanor. The District Court found full confirmation from this testimony of the interpretation placed upon Claim 1 in Finding No. 27 (R. 922). Finding No. 27 should be sustained.

The District Court's findings on Claim 1 are supported by the record. Thus the phrase "rotatably engaging" gives a meaning to this claim which excludes Defendants' wheelless pusher; and in view of file wrapper estoppel, and in view of positive, disclaiming statements in the patent itself and in view of Stearns' abandonment of a wheelless pusher, the Court properly refused to give Claim 1 a broader interpretation.

III. The District Court Properly Construed Claim 7 in the Light of the Facts and the Legal Rules of Claim Interpretation as Being Limited to a Device in Which the Pusher Is Rigidly Fixed to the Carriage.

Plaintiffs rely "primarily" on Claim 1 (Finding No. 16, R. 918; statement by Mr. Simms, R. 958, 959). They regard Claim 7 as a "lesser" claim.

The reason that Claim 7 is a "lesser" claim is evident from a comparison of that claim, on the one hand with its embodiment in Plaintiffs' structure, Pls.' Exhs. 16 and 17, (which is illustrated in "Exhibit C" appended to Plaintiffs' Brief) and, on the other hand, with Defendants' device, Pls.' Exhs. 26A, 26B and 26C (which is illustrated in "Exhibit D" appended to Plaintiffs' Brief).

Claim 7 calls for "a carriage comprising a platform on wheels." This is shown at 2 in Fig. 1 of the Stearns Patent and is colored brown in "Exhibit C" appended to Plaintiffs' Brief. A similar element is employed in Defendants' device, Plaintiffs' Exhibit 26B, which is shown in brown in "Exhibit D" appended to Plaintiffs' Brief. The same element is also shown in the prior Brannon detector, Defs.' Exh. FF (R. 778).

Claim 7 also calls for "an exploring electrode in the form of a flexible elongated member of circular cross-section and of electric-

ally conductive material adapted to embrace such member adjacent said carriage." Construing this to mean a coiled spring electrode, both Plaintiffs' and Defendants' devices employ it. This element is shown in yellow in "Exhibit C" and "Exhibit D" appended to Plaintiffs' Brief.

Claim 7 also calls for "an electrode pusher and contactor carried by and electrically insulated from said platform and having parts in mechanical and electrical contact with said electrode."

Pausing at this point and giving Claim 7 its broadest possible meaning to include any type of pusher and contactor which makes any type of contact with the electrode and which is connected by any means to the platform or carriage, then indeed Defendants' device also has a similar "pusher and contactor" (the pusher rod and shoe and the electric cable colored green in "Exhibit D" appended to Plaintiffs' Brief).

But can this element of Claim 7 be so broadly interpreted? The District Court properly held that it could not.

The applicable statute now in force is 35 U.S.C. 112, which requires that a patent claim shall particularly point out and distinctly claim the invention. The statute permits an element of a combination claim to be "expressed as a means * * * for performing a specified function" and it provides that "such claims shall be construed to cover the corresponding structure * * * described in the specification and equivalents thereof."

Under 35 U.S.C. 112, this particular element of Claim 7 (the pusher and contactor) must be construed as "a means * * * for performing a specified function." One may not, under the statute, interpret this element of Claim 7 broadly, literally and without regard to its function.

The function of this element is stated in the claim itself; it is to translate "movement of said carriage longitudinally along" a pipe into "a rolling movement of said electrode along" the pipe.

A glance at Pls.' Exhibit 26A, 26B and 26 will demonstrate that Defendants' device is incapable of this function. Referring to "Exhibit D" appended to Plaintiffs' Brief, the pusher (green) is a rod with a shoe at one end to engage the electrode (yellow) and a cable at the other end to connect to the high voltage apparatus within the carriage (brown).

Clearly "movement of said carriage longitudinally along a member to be tested will [*not*] cause a rolling movement of said electrode along such member."

Plaintiffs argue that when a human operator grasps the handle of the carriage in one hand and the rod in the other hand, he supplies the connection "whereby movement of said carriage longitudinally * * * will cause a rolling movement of said electrode." They argue that the rod plus the flexible electrical cable (which establishes an electrical connection) and the human operator (who supplies a mechanical connection) are the equivalent of the rigid pusher of Figs. 1 and 10 of the Stearns Patent, which is rigidly connected to the carriage so as to translate movement of the carriage into movement of the electrode.

This is an exaggerated, fantastic construction of Claim 7 and is completely at variance with the facts, as shown by the following considerations:

1. This construction does violence to common sense. The critical element of Claim 7 is referred to as a "pusher." This is meaningful because, in operation, the carriage is moved toward the electrode, not away from it; that is, movement of the carriage in relation to the electrode is a pushing movement and not a pulling movement. If Defendants' carriage is pushed toward the electrode, it will have no effect on the electrode until it overruns it. Then the carriage may displace the electrode somewhat, but it will not cause rolling movement of the electrode along a pipe, and it will not carry out the intended inspecting function. The "push-

ing" force on the electrode is exerted by the hand of the operator and is quite independent of motion of the carriage.

2. The only reason for using a wheeled carriage is to rest its weight on the pipe and to relieve strain on the human operator. Rasor so testified (R. 419). Brannon employed a detector in which the electric high voltage apparatus is contained in a carriage on wheels which rolls on the pipe (Defs.' Exh. FF, R. 778, 779). Defendants have other apparatus (Defs.' Exhs. T and U) which are similar to Pls.' Exhs. 26A, 26B and 26C, except that the electrical apparatus is sufficiently light to be contained in a case and carried on an operator's back like a knapsack. Claim 7, if construed as Plaintiffs would have it, would cover simply the fact that the electrical high voltage apparatus is equipped with wheels and is rolled along the pipe. This much was done by Brannon. This is the same principle employed by prehistoric man when he took a load of firewood off his back and placed it on a wheeled cart. Claim 7, if construed this broadly, would be invalid for failure to particularly point out and distinctly claim the invention as required by statute, 35 U.S.C. 112.

The District Court found that "Claim 7 requires that the pusher be a solid, rigid, immovable structure mechanically carried by and moving with the carriage so that movement of the carriage causes movement of the electrode" (Finding No. 40, R. 925). The District Court also found that Defendants' device does not employ such an element (Finding No. 41, R. 925, 926); that Defendants' device does not copy the structure of Claim 7 (Finding No. 42, R. 926); and that Defendants' device is not the equivalent of Claim 7 because it will not do the same work in the same way to accomplish the same result (Finding No. 43, R. 926). These are reasonable findings based upon a reasonable interpretation of Claim 7, read in the light of the specification and drawings of the patent. The burden is on Plaintiffs to prove a contrary meaning. Plaintiffs have failed to sustain the burden of proof.

Plaintiffs' expert witness, Lee, testified at length (R. 315-318) as to the "equivalence" of the structure of Claim 7 and Plaintiffs' Exhibits 26A, 26B and 26C. The substance of Lee's testimony is that the latter is equivalent to the structure of Claim 7 because of the way it is operated. The following question was put to Lee by Plaintiffs' counsel (R. 317):

"Q. Then, as a practical matter, do you believe that the green portion of the claim is carried by the brown portion of the claim?"

Lee's answer (R. 318) was as follows:

"A. Yes, sir, because in order to use the equipment there is no way to operate it other than to go ahead and put it in that form and operate it (illustrating)."

This testimony was heard and the demonstration observed by the District Court. The Court was not persuaded by this demonstrative evidence that Plaintiffs' burden of proof had been sustained. Accordingly, Finding No. 43 of lack of equivalence should be sustained.

IV. Plaintiffs Seek an Interpretation of Claims 1 and 7 Which Would Give Them a Monopoly of a Result Rather Than a Monopoly of a Means of Accomplishing a Result.

The fantastically broad interpretation which Plaintiffs place upon Claim 7 is discussed above, pages 19 to 23. Although Claim 7 specifies that it is movement of the carriage which causes rolling movement of the electrode, Plaintiffs ignore this limitation and interpret Claim 7 to cover merely the fact that Defendants support and roll their carriage on the pipe.

In Claim 1, Plaintiffs deny the plain meaning of the qualifying phrase "rotatably engaging" and now take the strange position that wheels or rollers are "bother", "expense" and "trouble" rather than a necessity (Lee, R. 334, last answer).

Plaintiffs' tendency to treat their claims "like a nose of wax" (*White v. Dunbar*, 119 U.S. 47, 51), and their intent to terrorize competitors is shown even more clearly by the statement made on page 7 of their brief as follows:

"Defendants introduced evidence of other holiday detector models made by them subsequent to the filing of the Complaint herein. Stearns contends such detectors which have the pusher and electrode of the type of Plaintiffs' Exhibits 26A and 26C infringe Claim 1 of the Stearns patent. Mr. Rasor testified all models were so-equipped (R. II, p. 452). Where the models also have carriages for riding the pipe, Claim 7 is urged as infringed."

The "other holiday detector models" referred to include the D-3 (Defs.' Exh. T), DS-3 (Defs.' Exh. U) and Model H (Defs.' Exh. V) detectors. These were developed by research on the part of Defendants and patents have been granted to Defendants upon them.²

Defendants' D-3 and DS-3 models are illustrated in brochures, Defs.' Exhs. T and U. In the D-3 model, the coil spring is a half circle and its ends are journaled in the ends of a semi-circular yoke. The spring in this electrode does not have "its ends secured together to completely embrace" the pipe, as required by Claim 1. Yet Plaintiffs contend that the D-3 infringes Claim 1. The DS-3 is an "All-Purpose Holiday Detector," which employs the half circle electrode of the D-3, or a full circle electrode.

Defendants Model H detector is illustrated in a brochure, Defs.' Exh. V. In this model, the spring electrode is propelled quite differently than the spring electrode of the Stearns device. It is propelled by a torque applied axially rather than by a pushing force applied laterally against the exterior of the spring. The electrode does not have its ends connected together as required by Claim 1, yet Plain-

2. Exhibits T, U and V show "Patents Pending". Patents Nos. 2615077 and 2629002 have been issued since the trial.

tiffs state that it infringes Claim 1. The Model H detector does not have a pusher which is "electrically insulated from" the platform as required by Claim 7. Yet, because the Model H has a carriage which carries the electrical apparatus and which rolls on the pipe, Plaintiffs assert it infringes Claim 7.

There is still further evidence that, if Plaintiffs succeed in their contentions in this Court, they will wage a campaign of terror against all who accomplish the result of rolling a spring on a pipe to detect holidays, regardless of the means employed to do it. This evidence will be found in colloquy between the District Court and Mr. Simms during the November 10, 1955, hearing.

At this point, it is appropriate to observe that Plaintiffs' Brief comments on observations of the District Court which appear favorable to Plaintiffs' side of the case. These observations were made by the District Court while conscientiously considering the arguments of both counsel and endeavoring to understand both sides of the case. At the conclusion of arguments, after all had been said, and after mature consideration of proposed findings of facts and conclusions of law submitted by both parties (R. 914), the District Court concluded that Plaintiffs had not sustained their burden of proving infringement.

Near the close of oral arguments on November 10, 1955, the District Court inquired earnestly and persistently of Mr. Simms as to the scope of the claims. The colloquy of Court and counsel is reported commencing at R. 1000, about the middle of the page:

"The Court: When your Claim 1 doesn't specify, doesn't say a roller, doesn't say a block, doesn't say anything, does it include everything?

"Mr. Simms: It includes any means which will perform the functions out.

"The Court: Then in not claiming in Claim 1, you claim everything, is that it?

"Mr. Simms: Every means which will perform the function. That also is in accordance with the patent statute, that an inventor may include an element in his claim—"

"The Court: Where is your authority for your statement that if in your claim you don't claim everything specifically, you naturally claim everything, known and unknown?"

"Mr. Simms: Your Honor, when you say you claim everything, that is an awfully broad statement. I don't know as I positively follow your meaning, but you claim everything that operates in the same way, do substantially the same thing and give the same results.

"The Court: Under your theory, then, as far as Claim 1 is concerned, it doesn't make any difference whether you use a roller or whether you use a bearing, or whether you use a block. It doesn't make a particle of difference, does it?"

"Mr. Simms: It doesn't make any difference in the practice of the invention, and that is our contention."

At page 1002 of the record:

"The Court: You don't contend that the only thing that will produce that particular result is the arm and connection you have?"

"Mr. Simms: Not whatsoever. Anything that will make that engagement and connect the spring to high voltage testing circuits for rolling such spring along such elongated member."

At the bottom of page 1002 and top of page 1003 of the record:

"The Court: Isn't it your contention that it doesn't make any difference what kind of a connector they have, whether it is a rod or by wand or by a tongue, as long as it does these things, it is an infringement of your patent?"

"Mr. Simms: That is substantially our position, yes, your Honor, that is the thing that was pointed out to the Patent Office to distinguish this invention. That is the thing that the Court of Appeals held distinguished it in part."

It will be seen that the Court repeatedly pressed Mr. Simms for his position with regard to the scope of the claims, but all he could get from Mr. Simms was that the claims cover anything that will accomplish the result.

This is functional claiming at its worst, of the type condemned in *The Incandescent Lamp Patent*, 159 U.S. 465, 475, 476; 40 L.Ed. 221, 225 (1895) and *Holland Furniture Co. v. Perkins Glue Co.*, 277 U.S. 245, 257; 72 L.Ed. 868, 873 (1928).

It is well at this point to summarize and list the instances of overclaiming by Plaintiffs; of claiming a result rather than the means of accomplishing a result.

1. The language in Claim 7 specifying the function of the pusher does not limit the claim; Claim 7 covers any detector in which the electrode is a spring rolled on the pipe and in which the electrical apparatus is on wheels supported by the pipe.

2. The language "rotatably engaging" in Claim 1 does not limit the claim, notwithstanding the fact it was introduced by amendment and notwithstanding the fact that the specification plainly indicates that the pusher has wheels or rollers. It appears now that Stearns' wheels or rollers were merely "expense", "bother" and "trouble" and should be avoided.

3. The language of Claim 1, "having its ends secured together to completely embrace" the pipe, imparts no limitation whatsoever; Claim 1 covers a half circle electrode whose ends are 180° apart (Defendants' Models D-3 and DS-3) and the electrode of Defendants' Model H wherein the ends of the electrode are spaced widely apart.

4. The Stearns Patent covers a wholly new concept (Defendants' Model H, Defs.' Exh. V), in which the spring is no longer supported by the pipe and is rolled by an axial torque.

5. The language in Claim 7, "an electrode pusher and contactor * * * electrically insulated from said platform" imparts no limitation; Claim 7 covers Defendants' Model H, in which the "pusher" (assuming there is a pusher) is electrically connected to (not insulated from) the platform.

6. Mr. Simms told the District Court quite bluntly that the claims cover every structure which accomplishes the same result, regardless of the means employed.

Seldom has there been a case in which the patentee has so flagrantly treated his claims "like a nose of wax which may be turned and twisted in any direction" (*White v. Dunbar*, 119 U.S. 47, 51; 30 L.Ed. 303, 305).

Unless this court puts a stop to it, Plaintiffs will toss out all the rules of claim interpretation and will sue and harass every firm and person who rolls a spring on a pipe, regardless of the means of doing it. Plaintiffs will have a monopoly on a result.

V. The District Court Properly Found That Plaintiffs Have Misused Their Patent.

A. FINDINGS NOS. 46-55 PROPERLY HOLD THAT PLAINTIFFS' PRACTICE OF LEASING ONLY A COMPLETE DETECTOR; OF REFUSING TO SELL; AND OF REFUSING TO SELL OR RENT PARTS OF DETECTORS, IS AN UNLAWFUL ATTEMPT TO EXTEND THE MONOPOLY OF THE PATENT TO UNPATENTED MATERIALS.

The findings of the District Court pertaining to Plaintiffs' leasing practice are Findings Nos. 46 to 55 (R. 926-928).³

There appears to be no dispute that Plaintiffs' product is the Stearns Electronic Holiday Detector (Finding 46, R. 926); that this product consists of certain Patented Apparatus (the electrode-pusher-carriage combination) and certain Electrical Apparatus (the high voltage generating and signaling apparatus, Finding No. 47, R. 927); and that the Electrical Apparatus is not covered by the Stearns Patent (Finding No. 48, R. 927). Plaintiffs' Brief raises no question concerning the findings that the unpatented Electrical Apparatus represents the major portion of the cost of a Stearns Electronic Holiday Detector, and that the Patented Apparatus represents not greatly in excess of 10% of the cost of the complete apparatus (Findings Nos. 49 and 50, R. 927). If any question is raised in this regard, the Court is referred to the testimony of Stearns, R. 167, last question, and R. 168 and 169.

3. Findings Nos. 57-60 (R. 929) relate to Plaintiffs' licensing policy and are discussed *infra*, pages 39 to 41. Finding No. 56 has been deleted (R. 932, 933).

Finding No. 51 (R. 927, 928) is that the D. E. Stearns Company follows an exclusive exploitation policy as follows: It will lease but refuses to sell the Stearns Electronic Holiday Detector; it refuses to sell or lease components; it will not make the Patented Apparatus available except in conjunction with and tied to the unpatented Electrical Apparatus; and it requires users to lease the apparatus as a whole, both patented and unpatented parts.

There is a dispute between the parties as to Finding No. 51. Plaintiffs in their Brief take issue with such words as "refuses" and "requires".

The basis for this finding is the testimony of Dick E. Stearns himself, which appears in the record at R. 166-167, as follows:

"Q. By Mr. Gregg: Mr. Stearns, does the D. E. Stearns Company follow the policy of leasing holiday detectors?

A. Yes, sir.

Q. You do not sell holiday detectors, is that correct?

A. Not in the United States.

Q. Not in the United States?

A. No.

Q. Mr. Stearns, does the D. E. Stearns Company sell or lease any parts of holiday detectors?

A. No, sir.

Q. They do not?

A. Except as replacement parts. If the damage to a machine is beyond the scope of ordinary wear and tear, a charge is made for repairs.

Q. In other words, I cannot come to you and obtain parts unless I am a lessee of a Stearns holiday detector, is that correct?

A. Well, you don't get—the lessee of Stearns detectors doesn't get parts, they get machines repaired for them and then they are charged for the repairs, if the breakage which necessitates that repair is beyond the scope of ordinary wear and tear.

Q. You do not supply parts except as replacements for parts of Stearns holiday detectors, is that correct?

A. That's correct."

Finding 51(a) (R. 927) is that the D. E. Stearns Co. "refuses to sell the Stearns Electronic Holiday Detector." Mr. Stearns testified that the D. E. Stearns Co. follows the policy of leasing holiday detectors, and in answer to the question: "You do not sell holiday detectors, is that correct?", his answer was: "Not in the United States."

Plaintiffs appear to take the strange position that, although Mr. Stearns testified that the D. E. Stearns Company does not sell holiday detectors, it does not follow that it "refuses" to sell holiday detectors. If this is Plaintiffs' position, then it is completely answered by the testimony of defendant John P. Rasor that Tinker & Rasor sells and leases its holiday detector according to customers' desires, and that in the year 1951 (which was the last calendar year preceding trial) its business consisted of 20% rentals and 80% sales (R. 437, 438). If a competitor of the D. E. Stearns Company sells or leases in accordance with customers' desires, and as a result its sales predominate over rentals in the ratio of 4 to 1, the inference must be drawn that the D. E. Stearns Company *refuses* to sell its holiday detector.

Finding 51(a), therefore, must be sustained.

Finding 51(b) (R. 927), is that the D. E. Stearns Company "refuses to sell or lease components of the Stearns Electronic Holiday Detector." In this connection Mr. Stearns was asked (R. 166):

"Q. Does the D. E. Stearns Company sell or lease any parts of holiday detectors?"

to which Mr. Stearns gave the answer:

"No, sir."

with the qualification that "replacement parts" were provided. The matter was pinpointed even more precisely as follows (R. 166, 167):

"Q. You do not supply parts except as replacements for parts of Stearns holiday detectors, is that correct?

A. That's correct."

This testimony was given in open court with ample opportunity to correct any misapprehension by cross examination. Plaintiffs failed to correct any misapprehension. How, in the face of this, Plaintiffs can now contend in good faith that the record fails to prove they *refuse* to sell or lease components for holiday detectors passes all understanding.

Accordingly, Finding 51(b) must be sustained.

It follows logically from Findings 51(a) and (b) that the D. E. Stearns Company "will not make the patented apparatus available except in conjunction with and tied to the Electrical Apparatus" (Finding 51(c), R. 927), and that "It requires users to lease the apparatus as a whole" (Finding 51(d), R. 928).

Finding No. 52 (R. 928) is that the Stearns Patent establishes on its face the fact that the unpatented Electrical Apparatus "is a separable, divisible part of the Stearns Electronic Holiday Detector and that the Patented Apparatus need not be employed with the Electrical Apparatus of the D. E. Stearns Company but may be used with electrical apparatus of other types."

Referring to Figure 1 of the Stearns Patent (R. 754), it will be seen that the carriage 2, the pusher mechanism at the front (left) of the carriage, and the electrode 56 are separable from the electrical apparatus which is supported on the carriage. The Stearns Patent (R. 758) at page 1, col. 1, lines 42-49, states:

"This application relates more particularly to a means whereby an electrical apparatus, *such as* described in said prior application, may be readily transported along a pipe line, to a special electrode by which the surface of such a pipe line, or the like, may be explored efficiently and readily moved along such pipe line, or the like, with said electrical apparatus."

At page 3 (R. 760), col. 1, line 75, to col. 2, line 21, the patent states:

"While it has been explained that the *actual structure and arrangement of the electrical high voltage source in the*

cabinet 15 forms no part of this invention, it is noted that suitable visual signals 75 may be provided for giving a visible indication when a defect in the pipe coating is encountered, and that suitable controls 76 may be provided for this structure. Audible signal means in the form of a bell 77 is also shown. Also, a suitable power source in form of batteries, or the like, may be provided as well as a means for placing a mark on the pipe if desired when a defect is encountered. Such latter means is a solenoid 78 connected to the high voltage device by means of connection 79, the plunger 80 within this solenoid being connected to a bell crank 81. The bell crank 81 carries a marker 82 and is urged in a direction to lift said marker away from the pipe by means of a spring 83. The bell crank is pivoted at 84 to a suitable bracket 85, which in turn is secured to the carriage by means of cap screws 86, or the like."

It is clear that the Stearns Patent itself treats the particular electrical apparatus described as optional. The District Court properly found that the unpatented Electrical Apparatus and the Patented Apparatus are separable, divisible components.

Finding No. 54 (R. 928) follows logically and inevitably from the preceding findings, namely, that "The actual realistic effect upon competition of the tie-in policy of the D. E. Stearns Co. is to require persons who desire to obtain the separable Patented Apparatus to take and pay for the unpatented Electrical Apparatus as well."

Findings Nos. 53 and 55 relate primarily to another phase of this case, namely, Defendants' counterclaim for damages, which is the subject of Defendants' "Opening Brief" filed August 31, 1956 (the green covered brief). These findings are not necessary to support Finding No. 54. However, attention is briefly called to the following:

Rasor testified (R. 439-441) that a substantial market exists for parts of holiday detectors, and that parts, including electrical components, such as batteries and ground wires, could be sold

for Stearns detectors but have not been sold by defendants for Stearns detectors. This Court may take judicial notice of the fact that in many businesses a thriving trade exists in the supply of parts for machines. The automobile business is a notable example. Thus, manufacturers of automobiles sell their products complete, but the purchasers of such automobiles frequently order replacement parts from sources other than the automobile manufacturer. This gives rise to a very thriving parts trade which is made possible by reason of the fact that automobile manufacturers sell their products and do nothing to discourage purchasers of automobiles from obtaining parts from other sources. In the case at bar Plaintiffs will only lease their holiday detectors, and the lease agreement (Defs.' Exh. H, second page) requires the lessee to pay Stearns a minimum royalty of \$5.00 per day, whether the detector is in use or not.

Clearly, a person using a Stearns detector will keep it only as long as he needs it and will then return it to Stearns so as to terminate the payment of minimum rental. This being the case, the user will not be inclined to purchase replacement parts. It follows inevitably that a potentially thriving parts trade is stifled.

B. THE DISTRICT COURT PROPERLY APPLIED THE LAW OF MISUSE TO FINDINGS NOS. 46-55. ANY DIFFERENCE BETWEEN PLAINTIFFS' PRACTICE AND POLICIES CONDEMNED HERETOFORE IS WITHOUT LEGAL SIGNIFICANCE.

The basic rule with regard to patent misuse can be described with reference to three leading cases. In *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510, 513; 61 L.Ed. 871, 876, 877 (1917), the Supreme Court laid down the following rule:

“The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification” (243 U.S. 510)

* * * * *

"This construction gives to the inventor the exclusive use of just what his inventive genius discovered. It is all that the statute provides shall be given to him and it is all that he should receive * * *." (243 U.S. 513)

The reason for this rule is given in *Mercoïd v. Mid-Continent Investment Co.*, 320 U.S. 661, 665, 666; 88 L.Ed. 376, 381 (1944), as follows:

"It is the protection of the public in a system of free enterprise which * * * denies to the patentee after issuance the power to use it [the patent] in such a way as to acquire a monopoly which is not plainly within the terms of the grant."

The penalty for using a patent in a manner calculated to extend its monopoly to subject matter outside the scope of the patent, is that a court will deny relief to the patentee. As stated by the Supreme Court in the *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 493; 86 L.Ed. 363, 366 (1942):

"Where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the monopoly of the unpatented article. * * * Equity may rightly withhold its assistance from such use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated."

It is not a necessary element of the defense of patent misuse that a defendant prove that he has been damaged. *Morton Salt Co. v. Suppiger Co.*, supra, at 314 U.S. 494; 86 L.Ed. 367 (1942):

"It is the adverse effect upon the public interest of a successful infringement suit in conjunction with the patentee's course of conduct, which disqualifies him to maintain the suit, regardless of whether the particular defendant has suffered in the misuse of the patent."

We maintain, in connection with our counterclaim for damages, which is briefed separately (green covered brief, filed August 31, 1956), that Defendants have been damaged, but in connection with this present brief and the *defense* of misuse, proof of damage is not necessary.

The first application of the doctrine of misuse was in 1917 in the *Motion Picture Case*, *supra*, 243 U.S. 502, 61 L.Ed. 871. The practice condemned in that case was the policy of a patentee in attaching a notice to a patented motion picture projector that it could be used only with film leased from the patentee.

It is natural to assume that today, after the lapse of nearly 40 years, transgressors are more subtle; that they do not employ such crude methods as fixing a restrictive notice of this character to the patented article. Plaintiffs in the case at bar point with pride to the fact that their lease contains no such restriction. It is important, however, to consider how subtleties and refinements of this nature have been dealt with by the courts since the *Motion Picture Case*.

In *Carbice Corp. v. American Patents Development Corp.*, 283 U.S. 27, 75 L.Ed. 819 (1931), the patent was on a container with dry ice. The container was sold only to those who purchased dry ice from the patentee. The patentee pointed out that in the *Motion Picture Case* the film was not a part of the patented device, whereas in the case at bar dry ice was a part of the patented device. The Court held that this difference was "without legal significance" (283 U.S. 33, 75, L.Ed. 823).

In *Leitch Manufacturing Co. v. Barber Co.*, 302 U.S. 458, 82 L.Ed. 371 (1938), the patent was on a method of treating concrete, using unpatented emulsion. The patentee sold emulsion, granting with the sale a free license to use the invention. The patentee sued a competitor who supplied emulsion for use with the process. The patentee maintained that this practice was legal because no agreement was entered into, nor any notice given

restricting users. All the patentee did was sue an infringer. This difference was rejected as being "without legal significance" (302 U.S. 462, 463, 82 L.Ed. 373).

The same patent and patentee were involved in a later case, *Barber Asphalt Corp. v. La Fera Grecco*, 116 F.2d 211, C.A. 3 (1940). The patentee had revamped its practice. It sold emulsion with a license to use the patented invention. It also extended licenses to anyone obtaining emulsion from competitors, such license requiring the payment of 1¢ per square yard of pavement treated. The Court held this to be "an illegal device entered into for the purpose of avoiding the prohibition enunciated by the Supreme Court in *Leitch Mfg. Co. v. Barber Company*" (116 F.2d 215, 216).

The second *Barber Case* was followed by this Court in *Dehydrators, Ltd. v. Petrolite Corp.*, 117 F.2d 183 (1941). The patent there was on a method of treating oil emulsions with turkey red oil. The patentee offered an "unlimited license" to those who bought turkey red oil from competitors, at a royalty equal to the difference between the patentee's price and the market price of turkey red oil. This scheme was held to be a misuse of the patent. The Court said at 117 F.2d 187:

"If the appellee [patentee] had been more interested in promoting or exploiting its patent than in selling its Tret-O-Lite [the turkey red oil sold by the patentee] it would have been a very simple matter to fix a royalty fee of so many cents per gallon whether purchased from the appellee or from outsiders"

In *B. B. Chemical Co. v. Ellis*, 314 U.S. 495, 498; 86 L.Ed. 367, 370 (1942), the patentee urged that it was convenient or necessary for all concerned to do business in a particular way, but the criterion of convenience was rejected as being "without significance."

In both *United States v. Univis Lens Co.*, 316 U.S. 241, 251, 252; 86 L.Ed. 1408, 1419 (1942) and *Mercoid v. Mid-Continent Investment Co.*, 320 U.S. 661, 666; 88 L.Ed. 376, 381 (1944), it was held that the particular method by which the monopoly is sought to be extended is immaterial.

A recent case substantially on all fours with the case at bar is *Cardox Corp. v. Armstrong Coalbreak Co.*, 194 F.2d 376, C.A. 7 (1952), certiorari denied 343 U.S. 979, 96 L.Ed. 1371. In the *Cardox Case*, plaintiff leased its product which was an "Airdox Unit" consisting of patented cartridges for blasting in coal mines with compressed air rather than an explosive, together with a motor, a compressor, several valves and unions, tubing and necessary connectors. The plaintiff's leasing practice was characterized identically to the leasing practice in the case at bar, as follows (194 F.2d 382):

"Plaintiff does not lease or sell its patented airdox cartridges separately, but only leases them in combination with other elements and equipment, the aggregation of which is called the Airdox Unit."

The court, commencing at page 382, discussed very ably and at some length several leading cases on patent misuse commencing with *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 283 U.S. 502. The court then pointed out defendant's contention there (which is Defendants' contention here), that the effect of the lease agreement was to enable the patentee to control unpatented accessories and material which were used in the unit in combination with the patented apparatus. The court then referred to the plaintiff's argument there (which is Plaintiffs' argument here) that its lease contained no tie-in clause but that the lessee of an Airdox Unit might purchase unpatented materials and equipment similar to those used in the Airdox Unit from whomever he chose; that there was no provision in the lease that lessee should not use compressors, etc., obtained from competitors. In rejecting the pat-

entee's arguments and sustaining defendant's position the court said at page 383:

"The Supreme Court has pointed out that it is not necessary that the lease or other contract contain express provisions of a tie-in or other agreement limiting competition. *The actual realistic effect upon competition is important.*" Citing *International Salt Co., Inc. v. United States*, 332 U.S. 392, 398; 92 L.Ed. 20.

The court then referred to *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271; 93 L.Ed. 672 and stated the rule of that case as follows:

"* * * an appearance of freedom from abuse of patent by imposing on licensees, either as a condition of license, or otherwise, any requirement, condition, agreement or understanding as to purchase or use of unpatentable commodities, is not conclusive, *if it conceals a subterfuge and if there is real, although informal restraint.*"

Finally, in the last two paragraphs of the opinion, the court reached the following conclusion:

"The trial court made a finding of fact that the plaintiff's lease did not contain a tie-in clause. We regard this as a conclusion of law. In any event the wording and contents of the lease agreement are not in dispute. There likewise is no conflict in the evidence as to the past business practice of plaintiff in only leasing its patented cartridges as part of a unit together with the unpatented compressor and other components. Although the question is not free from doubt, it is our view that under the authority of the cases cited, plaintiff's conduct constituted a misuse of its patents, by unlawfully extending and attempting to extend the monopoly of its patents.

"Judgment reversed, with instructions to dismiss the complaint."

In the present case, Plaintiffs lease a complete holiday detector and they refuse to sell it. Moreover, Plaintiffs will not sell or lease any of the components of their detector except as replacement parts for leased detectors. The leased detector of Plaintiffs comprises the Patented Apparatus and the separable, divisible Electrical Apparatus which, according to the Stearns Patent itself, need not be employed with the Patented Apparatus. It cannot be denied that if a person wishes to obtain the Patented Apparatus from Stearns, he may do so only by taking the unpatented Electrical Apparatus. Nor can it be denied that the major portion, costwise, of a complete Stearns Holiday Detector is the unpatented Electrical Apparatus.

Clearly, this is a case of the patented "tail" wagging the unpatented "dog"; of a bold attempt to make a patent on about 10% of a device monopolize the other 90%.

Clearly, if the *Cardox Case* is to be followed in this Circuit, Plaintiffs' practice must be held a misuse. Equally clearly, any slight differences that may exist between the facts of the present case and the facts of the *Cardox Case* are "without legal significance."

C. FINDINGS NOS. 57-60 PROPERLY HOLD THAT PLAINTIFFS' LICENSING POLICY IS NOTHING MORE THAN AN EXTENSION OF THEIR UNLAWFUL LEASING POLICY AND IS AN ATTEMPT TO FORCE PLAINTIFFS' LICENSEES TO DO BUSINESS IN THE SAME UNLAWFUL WAY AS PLAINTIFFS.

It is Defendants' position that Plaintiffs' leasing practice, in and of itself and quite apart from Plaintiffs' licensing policy, is a misuse of the Stearns Patent because it endeavors to extend the monopoly of a patent on an electrode-pusher-carriage combination to the apparatus employed with that combination.

We regard the District Court's findings concerning Plaintiffs' licensing policy as a delineation (which is amply supported by the record and is well founded in law) of an attempt by Plaintiffs to

extend their monopolistic leasing practice to their licensing operations.

Finding No. 57 (R. 929) is that the D. E. Stearns Company grants two forms of license (Defendants' Exhibits AA and BB), both of which require licensee to pay a royalty of \$250.00 for each electrode-pusher combination. The "selling" form of license (Defendants' Exhibit AA) permits the licensee to sell the patented electrode-pusher combination upon payment of a royalty of \$250.00 for each such combination. There is a proviso as follows in paragraph III of the license, commencing near the end of the third line:

"* * * provided, however, that when a particular electrode and electrode pusher combination is sold for use with a particular high voltage unit, Licensee may cause to be attached permanently to such high voltage unit a plate or label which Licensor will furnish upon payment of each royalty of two hundred fifty dollars (\$250.00) * * *"

The "rental" form of license (Defendants' Exhibit BB), charges the same royalty (\$250.00) as a license fee for rental of an electrode-pusher combination.

There can be no dispute that Finding No. 57 correctly states that the same royalty of \$250.00 must be paid, whether the patented electrode-pusher combination is sold or leased alone, or whether it is tied to a complete detector, including the unpatented electrical apparatus.

Findings Nos. 58 and 59 (R. 929) are that Rasor testified, without contradiction, that the Tinker & Rasor pusher and electrode combination (Pls.' Exhs. 26A and 26C) sells for about \$22.50; that it would not be possible to sell this combination (assuming it to be an infringement and that the selling license, Defendants' Exhibit AA, were accepted) by itself and pay a royalty of \$250.00; and that Tinker & Rasor would have to sell the electrode-pusher combination in conjunction with a complete detector. Rasor's uncontradicted testimony is reported at R. 444-448.

Plaintiffs point out (Plaintiffs' Brief, page 50, first par.) that, on cross examination, Rasor testified that in renting its detector Tinker & Rasor would recoup the \$250 in about one month (R. 466). Note, however, that the weekly rental of \$62.50 is the rental *for a complete detector* which sells for about \$1,200.00 (R. 445). The electrode pusher combination sells for about \$22.50. Obviously, it would be impossible either to rent or sell a \$22.50 item and pay a royalty of \$250.00. The very point made by Plaintiffs shows conclusively that Plaintiffs' licensing scheme is purposely rigged so that a licensee must follow the pattern set by the licensor. *A licensee must never let the public have the electrode and pusher except in combination with a complete holiday detector.*

Clearly, therefore, the District Court was justified in finding (Finding No. 60, R. 929) that

"Finding No. 60. The inevitable effect of the licensing policy of the D. E. Stearns Co. is to require licensees to adopt and adhere to the same policy as the D. E. Stearns Co., namely, offering patented apparatus only in conjunction with and tied to unpatented electrical apparatus, thereby restraining competition in unpatented components of holiday detectors."

VI. A Reply to Miscellaneous Assertions in Plaintiffs' Brief.

A. PLAINTIFFS ERRONEOUSLY DESCRIBE THE WHEELS OR ROLLERS OF THE STEARNS PUSHER AS A BEARING. THAT TERM IS NOT SO USED IN THE PATENT AND WAS NOT INTENDED BY STEARNS TO DESCRIBE THE WHEELS OR ROLLERS OF HIS PUSHER.

Throughout their brief, e.g., at page 10, first paragraph, Plaintiffs employ the term "bearing" to describe their pusher and the term "semi-sleeve bearing" to describe Defendants' pusher. Plaintiffs hope, by endless repetition, to persuade this Court that when the patent refers to "wheels" or "rollers", it means "bearings", and that Defendants employ a form of "bearing".

Stearns is an experienced engineer (R. 55-57) who obviously knows the meaning of technical terms. Chambers' Technical Dic-

tionary, Revised Edition, published by McMillan & Co., 1944, at page 83, defines "bearings" as follows:

"Supports provided to hold a revolving shaft in its correct position."

Stearns used the term "bearing" in this sense to describe certain parts of his device. At page 2 (R. 759), col. 1, lines 30-33, he refers to the "ball bearings 10" on which wheels 3 revolve. But the members 44 and 45 (Figures 1 and 10) and 68 and 69 (Figure 15) which contact the spring are referred to, not as "bearings" but as "wheels"; e.g., at page 2 (R. 759), col. 2, lines 28-29, 36 and 50, and page 3 (R. 760), col. 1, lines 12, 18 and 23. These "wheels" are in turn supported by "bearings" (page 2, col. 2, lines 41-43), but nowhere are the wheels themselves referred to as "bearings." Claims 2, 3, 4, 5, 6 and 8 all refer to "rollers".

It is significant, indeed, that a highly trained engineer such as Stearns would refer frequently to 'bearings' but never in connection with the means contacting the electrode. The latter are quite properly described as "wheels" or "rollers". Wheels not only support something, but rotate, and thereby move what they support. Bearings have the passive function of supporting and allowing something to rotate. The Stearns Patent teaches that the wheels 44 and 45 are made to rotate, and wheels 68 and 69 "must rotate easily to cause proper propulsion of the electrode."

The idea that "wheels" or "rollers" are synonymous with "bearings", and that Defendants employ a "semi-sleeve bearing", is an ingenious invention which, however, does not accord with the facts as they existed *ante litem motam*.

B. PLAINTIFFS ERRONEOUSLY CONTEND THAT, AS TO THE ISSUE OF INFRINGEMENT, ONLY QUESTIONS OF LAW EXIST.

This contention is made at page 19 of Plaintiffs' brief. A comparison of the facts of the present case with those of the first case cited by Plaintiffs will demonstrate the error of this contention.

In *Stuart Oxygen Co. Ltd. v. Josephian*, 162 F.2d 857, C.A. 9 (1947), the patent was on a means for securing a number of oxygen cylinders in a manner to permit ease of handling. This was accomplished by strapping the cylinders to a "plate" or "truck" having an outer rim and a circular base of smaller diameter than the outer rim. The truck would support the cylinders not only in vertical position, but also in tilted position, in which the truck would rest on the edge of the base and the edge of the outer rim. This is clearly illustrated in the patent drawings reproduced in the report at 162 F.2d 858. The fact that the truck and its load were stable in tilted position permitted moving the cylinders with ease by tilting and rolling them, without danger of tipping over.

The accused device differed only in that, in the tilted position the cylinders would rock back to the vertical position unless restrained.

The critical phrase in the claims was "having a second stable position when tilted". This phrase was present in the claims as filed, i.e., it was not introduced by amendment. Hence file wrapper estoppel did not apply. Inspection of the file wrapper, which is printed in the record of the case, shows this to be a fact.

Moreover, the patent stated at page 2, col. 1, lines 42-47:

"I wish it to be distinctly understood that the drawing given here is illustrative only, and that the relative diameters of track 11 and lower plate 8 may be varied as desired to control the amount of force necessary."

This situation contrasts with the facts of the case at bar as follows:

In the first place, the patent in the *Stuart Case* made it clear that a considerable latitude was permissible in regard to the point at issue, whereas in the Stearns Patent it is emphasized that the wheels on the pusher are driven, or if not driven, *must rotate easily*.

In the second place, the critical language in the claims of the Josephian patent was present in the claims as filed and was not added by amendment as a condition for the allowance thereof.

The facts did not call for application of the rule of file wrapper estoppel and the rule of strict interpretation. In the case at bar, the critical phrase "rotatably engaging" was inserted in Claim 1 by amendment, therefore invokes the rule of file wrapper estoppel and the rule of strict interpretation. Testimony was taken at the trial regarding the interpretation of the ambiguous language "rotatably engaging" in Claim 1 (Cf. testimony of Lee, R. 334; Peterson, R. 522, 523; Stearns, R. 89, 90; 112-115). Testimony was also taken regarding equivalence of Defendants' device and the structure of Claim 7 (Lee, R. 317, 318). There is ample evidence to support the District Court's findings regarding infringement.

C. PLAINTIFFS SUGGEST THAT THE CRITERION OF INFRINGEMENT IS A COMPARISON OF THE DEFENDANTS' STRUCTURE WITH SOMETHING OTHER THAN THE CLAIMS OF THE PATENT. THIS IS NOT THE PROPER CRITERION OF INFRINGEMENT.

At page 20 of their Brief, Plaintiffs criticize the District Court because it "made no formal finding of fact comparing the Defendants' holiday detector with the invention as determined by the Court of Appeals * * * A mere visual comparison of Exhibit D, attached to this brief, with the drawings of the patent in suit (Exhibit C) illustrates the correctness of the Trial Court's characterization and completeness of Defendants' appropriation of the Stearns' invention." Appended to Plaintiffs' Brief and identified as "Exhibit C" is a reproduction of Figs. 1, 7, 10 and 15 of the patent drawings with colors added. In "Exhibit D" appended to Plaintiffs' Brief is a picture of Defendants' holiday detector colored to show what are said to be corresponding parts.

Again, on pages 24 and 25, Plaintiffs suggest that the criterion of infringement is a comparison of the invention of the patent with the accused device and they criticize the District Court because it made no such comparison.

The District Court did compare Defendants' device with the *claims* of the Stearns Patent (Findings Nos. 34 and 35, R. 924

and Findings Nos. 40, 41, 42 and 43, R. 925-928). That is, and always has been, the proper basis of determining infringement.

Only the claims of a patent can be infringed. As stated in Walker on Patents, Deller's edition, page 1681, "infringement of a patent is an erroneous phrase; what is infringed are the *claims of the patent*." [Emphasis in the original.] Accordingly, a mere comparison of Defendants' device with the drawings of Plaintiffs' patent is not a proper basis of determining infringement.

If Plaintiffs wish to protect the appearance of their device, they have misconceived the form of protection. They should have sought the protection of a design patent under 35, U.S.C. 171, or copyright protection under the Copyright Code, Title 17 of the United States Code.

Kemart Corp. v. Printing Arts Research Laboratories, Inc., 201 F.2d 624, C.A. 9 (1953) cited by Plaintiffs is ample authority for the proposition that the claims must be looked to and even the "broadest claim can be no broader than his [the patentee's] actual invention" 201 F.2d 629. *Continental Paper Bag Co. v. Eastern Paper Bag Company*, 210 U.S. 405, 419, 52 L.Ed. 1122, 1128 (1908) points out that:

"* * * the claims measure the invention. They [the claims] may be explained and illustrated by the description. *They* [the claims] *cannot be enlarged by it.*"

D. PLAINTIFFS RELY UPON CERTAIN GENERAL STATEMENTS IN THE STEARNS PATENT TO GIVE THE INVENTION A BROAD CHARACTERIZATION. THESE GENERAL STATEMENTS MUST BE READ IN THE LIGHT OF RELATED SPECIFIC STATEMENTS. SO READ, THE GENERAL STATEMENTS ARE NOT A RELIABLE CRITERION OF THE BREADTH OF THE INVENTION.

Plaintiffs, in their effort to "give a broad characterization of the invention" (Plaintiff's Brief, page 29) point to general statements such as the following (Stearns Patent, page 1 (R. 758), col. 2, lines 14-19; Plaintiff's Brief, pages 28 and 29):

"Other objects and advantages of this invention will become apparent from the following description taken in connection

with the accompanying drawings, wherein are set forth by way of illustration and example certain embodiments of this invention."

This is a generalization which comes at the end of a statement of specific objects (Stearns Patent, page 1 (R. 758), col. 1, line 50 to col. 2, line 13).

One of these specific objects is "to provide a means for marking the pipe line whenever a defect in the insulating [sic] is encountered" (Stearns Patent, page 1, col. 2, lines 1-3). Figure 3 purports to be a drawing of "the pipe marking device forming a part of the invention" (Stearns Patent, page 1, col. 2, lines 30-35). *Yet none of the claims is directed to a pipe marking device.*

Another of the specific objects is "to provide such an exploring electrode which will not be apt to break or injure the insulating coating on the pipe line" (Stearns Patent page 1, col. 2, lines 9-11). Claims to the electrode itself were presented in the application as filed but were rejected and abandoned. (File wrapper, Defs.' Exh. L, Claims 9, 10, 11 and 12 at pages 15 and 16, cancelled at page 31; testimony of Peterson, R. 516-518)

It is clear that certain features (the marker, and the electrode *per se*) are specifically stated to be objects of the invention, but are not claimed. It is settled law that anything described but not claimed in a patent is dedicated to the public. *Mahn v. Harwood*, 112 U.S. 354, 360, 361; 28 L.Ed. 665, 668 (1884).

If specifically stated objects cannot be relied upon as a criterion of what is claimed, then how can a general statement concerning "Other objects and advantages" be relied upon?

It is apparent that the vague, general statements relied upon by Plaintiffs do not "give a broad characterization" of the critical language of Claim 1, which is "means rotatably engaging."

E. PLAINTIFFS ERRONEOUSLY CONTEND THAT THE ARGUMENT OF THE PATENT SOLICITOR IN AMENDING CLAIM 1 SUPPORTS THEIR INTERPRETATION OF CLAIM 1.

Remarks of Stearns' Patent Office solicitor (Mr. Browning, who is one of Stearns' counsel in the present case) pertaining to the amendment of Claim 1, are set forth verbatim at page 33 of Plaintiffs' Brief. These remarks do not clarify the meaning of the phrase "rotatably engaging" in Claim 1. Even if these remarks did clarify the meaning of this phrase in a manner favorable to Plaintiffs' position, Plaintiffs have artfully stated only half the rule of *Cutter Laboratories, Inc. v. Lyophile-Cryochem Corp.*, 179 F.2d 80, 87, C.A. 9 (1949). The entire rule is as follows:

"While arguments in the file wrapper cannot be used to expand the scope of a claim, they can be used to affirm a construction, permissible by the wording of the claims, as according with the intentions of the inventor and the Patent Office."

Plaintiffs seek to *expand* Claim 1, contrary to authority. It is also noteworthy that in the *Cutter Case* there was no file wrapper estoppel because there had been no amendment of the claim. Accordingly, in the *Cutter Case* the rule of strict construction against the patentee was not applicable. The rule of strict construction is required where there is file wrapper estoppel. *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 136, 137; 86 L.Ed. 736, 744. There is file wrapper estoppel in the case at bar.

F. PLAINTIFFS POINT TO THE FACT THAT CLAIM 1 RECITES "MEANS ROTATABLY ENGAGING", WHEREAS CLAIM 2 RECITES "ROLLERS", AND THEY RELY UPON THE RULE THAT A GENERIC CLAIM WILL NOT ORDINARILY BE CONSTRUED TO INCLUDE THE LIMITATION OF A MORE SPECIFIC CLAIM. BUT PLAINTIFFS NEGLECT TO STATE THE CONTROLLING RULE THAT NO CLAIM MAY EXCEED THE ACTUAL INVENTION.

Plaintiffs at page 31 of their Brief point to the fact that Claim 1 recites "means rotatably engaging", whereas Claim 2 recites "rollers."

The general, expansive rule and the controlling restrictive rule stated in the caption above were both considered recently by this Court in *Kemart Corp. v. Printing Arts Laboratories*, 201 F.2d 624, 633 C.A. 9 (1953). This Court stated that the expansive rule of claim interpretation

"is subordinate to the controlling rule that a patentee's broadest claim can be no broader than his actual invention, no matter how it may be expressed or what other claim his patent may contain."

In the case at bar, the Stearns Patent on its face, and Stearns abortive experience with a wheelless pusher (R. 89, 90; 112-115) establish the fact that his invention is no broader than a wheeled pusher.

G. CASES RELIED UPON BY PLAINTIFFS ON THE ISSUE OF MISUSE ARE DISTINGUISHABLE.

Plaintiffs rely mainly on *Electric Pipeline, Inc. v. Fluid Systems, Inc.*, 231 F.2d 370, C.A. 2 (1956); *Vulcan v. Maytag*, 73 F.2d 136, C.A. 8 (1934), and *United States v. General Electric Co.*, 272 U.S. 476, 71 L.Ed. 362 (1926) (Plaintiffs' brief pages 43, 48 and 51).

The *Electric Pipeline Case* concerned a patent on a heating system. The patentee installed the patented system in accordance with individual requirements of each customer. The system included unpatented components which the court characterized as "incidental to the sale of the system as a whole." (231 F.2d 372)

In the case at bar, the unpatented apparatus, far from being "incidental", accounts for the major portion of the cost of a Stearns Holiday Detector (Findings 48, 49 and 50, R. 927; testimony of Stearns, R. 168).

The *Vulcan Case* concerned a license agreement under patents on a swinging ringer and gear mechanism for use with power operated washing machines. The license agreement permitted licensee to use the invention only in connection with certain types

of washing machines. This was held not to be misuse of the patent.

In addition to the fact that the *Vulcan Case* is distinguishable, it is of doubtful authority. Certiorari was granted at 293 U.S. 553; 79, L.Ed. 656. The appeal was subsequently dismissed by stipulation of counsel. 294 U.S. 734, 79 L.Ed. 1263

The *General Electric Case* was an anti-trust case and is noteworthy chiefly because it sanctions an agreement between a licensor and a licensee of a patent fixing the price at which the licensee may sell the patented article.

There is nothing in the *General Electric Case* conflicting with the holding of the *Cardox Case*, or other cases on patent misuse relied upon by Defendants. Moreover, different considerations apply in an anti-trust case than apply in a case involving the defense of misuse of patents (*Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 490; 86 L.Ed. 363, 365 (1942)).

CONCLUSION

It is respectfully submitted that the District Court properly found Claims 1 and 7 not infringed by any devices manufactured or sold by the corporate defendant Tinker & Razor; that the District Court properly found Plaintiffs are barred from relief because of misuse of the Stearns Patent; and that Paragraphs I and III of the Judgment dismissing the Complaint and awarding Defendants costs in the Trial Court should be affirmed.

Respectfully submitted,

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Certificate of Service

Three copies of the within brief were served upon Dick E. Stearns and the D. E. Stearns Company on the day of October, 1956 by mailing three copies to H. Calvin White at 611 Wilshire Blvd., Los Angeles 17, California, attorney of record for the said parties, the same being the last address of said H. Calvin White known to the undersigned, such copies being sent through United States mail, postage prepaid.

EDWARD B. GREGG

No. 15,111

In the

United States Court of Appeals

For the Ninth Circuit

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a partnership composed of Dick
E. Stearns and Ellen Belson Stearns,

Appellants-Appellees,

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TINKER & RASOR, a corporation JOHN P.
RASOR and LEO H. TINKER,

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Reply Brief of Tinker & Rasor, John P. Rasor and Leo H. Tinker

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FILED

OCT 15 1956

PAUL P. O'BRIEN, CLERK

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Reply Brief of Tinker & Rasor, John P. Rasor and Leo H. Tinker

DEFENDANTS' COUNTERCLAIM FOR DAMAGES

Plaintiffs' Answering Brief (blue covered brief) correctly states, and it agrees with our position, that only one issue is involved in Defendants' appeal from dismissal of their counterclaim, to wit, whether the *fact* of injury has been proved. The *amount* or *extent* of injury may be determined later by an accounting.

This is a suit in equity of the type which normally proceeds in two parts. The first part is a determination of liability. If no liability is shown that is the end of it. If liability is shown, then the second part—a determination of the *amount* or *extent* of

liability—occurs by way of an accounting. In *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 693, 694; 77 L. Ed. 1449, 1454 (1933), the Court stated:

“There are times when a suit is triable in separate parts, one affecting the right or liability, and the other affecting the measure or recovery. In suits of that order a discovery as to damages will commonly be postponed till the right or liability has been established or declared”

The case at bar is of that type. It is our position that we have established liability, i.e., the fact of injury, and that dismissal of the counterclaim denies us the right to discovery as to damages.

The pertinent facts that have been proved are:

(1) Plaintiffs lease but refuse to sell their holiday detectors; they refuse to sell or rent parts of holiday detectors; and the practical effect of this tie-in policy is to require persons who want parts for Stearns detectors to acquire them only from Stearns (Findings of Fact Nos. 46-55, R. 926-928).

(2) Defendant Tinker & Razor engages in the sale of any and all parts for holiday detectors as well as in the sale and rental of complete holiday detectors (R. 438, 439).

(3) The sale of parts of holiday detectors is a substantial part of Tinker & Razor's business, amounting to 10-15% in 1951, which was the last calendar year before the trial (R. 439, 440).

(4) Parts of holiday detectors offered for sale by Tinker & Razor are shown in Defs' Exhs. W and Y, both of which are in the record as physical exhibits, offered and received in evidence at R. 441, 442.

(5) Although these parts happen to be parts for Tinker & Razor's detectors, such as Models DS-3 and C-3, many of them could be used for detectors of competitors, such as

Stearns detectors; e.g., electrode pushers, electrodes, batteries and ground wires (R. 441).

(6) None of these or any other parts offered for sale by Tinker & Rasor has, to Mr. Rasor's knowledge, been sold for Stearns detectors (R. 440, 441).

Defendants endeavored to prove why Tinker & Rasor has not been able to sell parts for Stearns detectors, by pointing out (testimony of Rasor at R. 440, 441) that

"A. Well, I would assume that somebody using a D. E. Stearns holiday detector would be renting it and they certainly would not buy any parts from us for something they don't own."

This testimony was stricken on Plaintiffs' motion "that it was an assumption" (R. 441).

This answer was, indeed, an assumption; it was an inference of one fact from another fact. And it is the *only* inference that can be drawn from the fact that the D. E. Stearns Co. unlawfully ties patented equipment with unpatented equipment; that it refuses to sell; that it will lease only complete detectors; that Tinker & Rasor engage in a very substantial parts business which could supply parts for Stearns detectors; but that Tinker & Rasor has never, to Mr. Rasor's knowledge, been able to sell parts for Stearns detectors. The only inference that can be drawn—and the inference the District Court should have drawn—is that *Tinker & Rasor has been precluded from the business of selling parts for Stearns detectors because Stearns adheres to an exclusive leasing policy; refuses to sell; and refuses to lease anything except complete detectors*. A tenant will not repair his landlord's house. Neither will a lessee of a Stearns detector purchase replacement parts from Tinker & Rasor. The practical effect is to exclude Stearns detectors from the market for parts. It is as if General Motors were to adopt a policy of leasing rather than selling cars;

it would stifle competition in the lucrative business of supplying parts.

Only the *degree* to which Tinker & Razor has been precluded from the market for parts for Stearns detectors remains in doubt. The degree should be determined by an accounting. Even if Tinker & Razor is able to prove only a small sum in damages, it is entitled to recover threefold that sum together with costs of suit including a reasonable attorney's fee (15 U.S.C.A. 15). As pointed out by Chief Justice Warren in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329; 99 L.Ed. 1122, 1128 (1955), vigilant enforcement of the antitrust laws by the instrumentality of the private treble-damage action is in the public interest.

Plaintiffs in the case at bar are adjudged guilty of unlawful conduct in violation of the antitrust laws. It has come to the attention of Defendants' counsel that Plaintiffs have recently seen the light of day; have changed their practice; and now sell their detectors, and even sell the patented combination apart from the apparatus as a whole. Plaintiffs purport to avoid evil in the future, and to avoid punishment for future evil. They also seek to avoid punishment for past evil by upholding the error of the District Court in dismissing Defendants' counterclaim. It is not in the public interest to allow past lawlessness to go unpunished. Defendants should be allowed to enforce the law by their private action for treble damages and costs of suit.

Cases relied upon by Plaintiffs are either distinguishable or support our position. Thus in *Twentieth Century-Fox v. Brookside*, 194 F.2d 846, C.A. 8 (1952), the action was at law and trial was by jury. Hence, liability and the measure of damages had to be proved in one proceeding. The quotation at page 13 of Plaintiffs' Answering Brief significantly omits the language:

"rather than uncertainty as to amount, and the fact that damages cannot be calculated with mathematical exactness does not make them so uncertain as to bar recovery." (194 F.2d 855)

Suckow v. Borax, 185 F.2d 196, C.A. 9 (1950) is pertinent only at stating the general rule that a private antitrust action is founded upon injury to the plaintiff. In *Triangle Conduit v. National Electric Prods. Corp.*, 152 F.2d 398, C.A. 3 (1945), the plaintiff failed in a private antitrust action because, as to the merchandise involved (bushings for cables), plaintiff's plant could scarcely supply plaintiff's own needs. That is, plaintiff could not have sold bushings for use with defendant's cables because plaintiff required all of its output of bushings for its own cable. In the case at bar, Tinker & Rasor has proved a substantial sale of parts.

In *American Banana Co. v. United Fruit Co.*, 166 Fed. 261, C.A. 2 (1908), plaintiff alleged that defendant kept it (plaintiff) out of the banana trade. The court noted (166 Fed. 264) that preventing a person from engaging in a prospective business is as unlawful as driving him out of an existing business, but the court decided for defendant because plaintiff failed to prove that it ever intended to engage in the banana business. In the case at bar Tinker & Rasor actually engages in the business of selling parts for holiday detectors to whomever wants them, but is prevented from engaging in the business of selling these same parts for Stearns detectors because of Plaintiffs' unlawful conduct.

Plaintiffs' Answering Brief suggests that there could be no injury because of geographical remoteness; because they are located in Shreveport, Louisiana and do business in mainly the Mid-Continent, Gulf Coast and Eastern areas, whereas Defendants operate in Southern California (Plaintiffs' Answering Brief, pages 5, 6 and 11). Thus it is Plaintiffs' contention that the two companies are so remote from one another that what one does cannot affect the other adversely. This is quite inconsistent with paragraphs V and VI of the Complaint (R. 4, 5) stating that Defendants' alleged infringement has damaged Plaintiffs, and it is inconsistent with their prayer for "an accounting for profits and damages" (R. 5, 6). If, by reason of geographic remoteness,

Plaintiffs cannot damage Defendants within the meaning of the antitrust laws, then obviously Defendants cannot damage Plaintiffs within the meaning of the patent laws.

COSTS ON THE FIRST APPEAL

Plaintiffs' Answering Brief, pages 13-16, states and restates the general rule that costs on appeal, including the cost of printing the record of the trial, are taxable against the party losing the appeal. But Plaintiffs overlook or completely sidestep the controlling fact in this case, namely, that the present case is before this Court on a Second Appeal *on the same printed trial record that was before this Court in the First Appeal*, supplemented only by a slender fourth volume. Both Plaintiffs and Defendants joined in a stipulation that the printed record from the First Appeal, Volumes I, II and III be used in this Second Appeal (R. 1022). This was done because there has been only one trial; the record of that trial had already been printed; and to cause the same trial record to be printed again would have been a needless expense and a burden on the facilities of this Court.

Now, it appears, because Defendants were gracious enough to join in a time-saving, money-saving, labor-saving stipulation, Plaintiffs insist that Defendants must pay for almost the entire printed record used in this appeal even though Defendants prevail in the present appeal.

In none of the cases relied upon by Plaintiffs was there a second appeal on the same trial record. Thus, in *Broffie v. Horton*, 173 F.2d 565, C.A. 2 (1949), there was not even a second appeal. In neither *Seeley v. Hunt*, 109 F.2d 595, C.A. 5 (1940) nor *City of Orlando v. Murphy*, 94 F.2d 426, C.A. 5 (1938), does it appear that the same printed record was used in two appeals. In *Troxell v. Delaware L. & W. R. Co.*, 205 Fed. 830, D.C., E.D. Pa. (1913), the first appeal was from an order denying a

pretrial motion. In *Land Oberoesterreich v. Gude*, 93 F.2d 292, C.A. 2 (1937), a new trial was ordered.

This appears to be a case of first impression. Equity demands that the cost of printing the record used in this appeal should be apportioned in the light of this Court's decision of the substantive issues.

CONCLUSION

It is respectfully submitted that Defendants have shown the *fact* of damage; that Par. II of the Judgment of the District Court (R. 934) dismissing Defendants' Counterclaim should be reversed; and that Defendants should be allowed to prove in a separate proceeding the *amount* of damage to them by reason of Plaintiffs' infraction of the antitrust laws.

It is also respectfully submitted that, in the event Defendants prevail in the Second Appeal, Rule 25 of this Court should be construed liberally to apportion the costs equitably between the parties.

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Certificate of Service

Three copies of the within brief were served upon Dick E. Stearns and the D. E. Stearns Company on the day of October, 1956 by mailing three copies to H. Calvin White at 611 Wilshire Blvd., Los Angeles 17, California, attorney of record for the said parties, the same being the last address of said H. Calvin White known to the undersigned, such copies being sent through United States mail, postage prepaid.

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No. 15,111

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a partnership composed of
DICK E. STEARNS and ELLEN BELSON STEARNS,
Appellants-Appellees,

v.

TINKER & RASOR, a corporation,
JOHN P. RASOR and LEO H. TINKER,
Appellants-Appellees

**PLAINTIFFS-APPELLANTS' REPLY TO BRIEF
OF TINKER & RASOR, JOHN P. RASOR
AND LEO H. TINKER IN ANSWER TO
PLAINTIFFS' OPENING BRIEF**

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FILED

OCT 24 1956

PAUL P. O'BRIEN, CLERK

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PLAINTIFFS' OPENING BRIEF**

I. SUMMARY

If one strips from defendants' brief all names and characterizations which the brief concludes should be applied to the various aspects of plaintiffs' case and looks behind the numerous approaches to the same issues, it develops that the actual issues contested in defendants' brief are few and simple. They are:

- (A) Does the doctrine of file wrapper estoppel require implying wheels or rollers into claim 1 when it does not recite them?
- (B) Is claim 1 infringed by defendants' structure, which structure complies precisely with all the requirements of claim 1 when read in their normal and natural meaning?
- (C) Is claim 7 infringed upon the basis of equivalency by defendants' structure, which admittedly complies with all structural requirements of the claim and functions in an equivalent manner to that recited in the claim?
- (D) Are plaintiffs guilty of misuse of their patent by their method of doing business in that they lease complete unitary machines embodying the patented invention and do not offer such machines nor their individual parts for sale, and in that they license others to make, use and sell what defendants contend is the patented combination?

II. THE DOCTRINE OF FILE WRAPPER ESTOPPEL

The doctrine of file wrapper estoppel does not restrict the language of a claim more narrowly than its normal meaning, particularly in the absence of prior art requiring such restriction. Plaintiffs do not contend that there is no file wrapper estoppel to be considered in connection with claim 1. However, this file wrapper only restricts the claim to the normal meaning of the words added by amendment and not to wheels.

Smith v. Snow, (1935) 294 U.S. 1, 14-16; 79 L. Ed. 721, 730;

National Hollow Brake Beam Co. v. Interchangeable B. B. Co., (C.A. 1901), 106 F. 693, 714;

Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., (C.A. 8, 1909), 168 F. 271, 278;

New York Scaffolding Co. v. Whitney, (C.A. 8 1915), 224 F. 452, 462.

The cited cases set at rest the limits which should be imposed on the doctrine of file wrapper estoppel. In the *National Hollow Brake Beam* case, which was the basis for the Supreme Court's decision in the *Smith v. Snow* case, the Eighth Circuit Court of Appeals said:

" * * * It is true that if a patentee acquiesces in the rejection of his claim on references cited in the patent office, and accepts a patent on an amended claim, he is thereby estopped from maintaining that the amended claim covers the combinations shown in the references, and from claiming that it has the breadth of the claim that was rejected (citing cases). But this is the limit of the estoppel. One who acquiesces in the rejection of his claim because it is said to be anticipated by other patents or references is not thereby estopped from claiming and securing by an amended claim every known and useful improvement which he has invented that is not disclosed by those references. The only limitation * * * was that he was thereby estopped from maintaining that it covered the devices disclosed in the references cited by the examiner, which the latter believed were within the limits of the claim first presented. * * * The proceedings in the patent office, therefore, have not so restricted the scope of this patent that the appellee can appropriate the principle and the combination it discloses and secures, and then escape liability by an immaterial change in the form of one of its elements."

The last clause of claim 1 is written below in its original form with the amendments added by interlineation to illustrate the history of the claim:

1. * * * and means rotatably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member.

Thus, it is seen that "means" was modified by the insertion of the amendatory matter "rotatably engaging and * * * and for rolling said spring along such elongated member." These words, when given their ordinary meaning or connotation are not restricted to wheels, and this is consonant with the remarks which accompanied the amendment.

III. DEFENDANTS' CHARACTERIZATIONS OF PLAINTIFFS' CHARGE OF INFRINGEMENT AND THEIR BUSINESS PRACTICES ARE REFUTED BY:

- (A) The Trial Court's analysis of Defendants' machine as a copy of Plaintiffs';
- (B) The facts — as distinguished from Defendants' characterizations in Defendants' brief; and
- (C) The integrated character of Plaintiffs' holiday detector.

Defendants, in their brief, employ strong language in an attempt to belittle plaintiffs' charge of infringement and to brand plaintiffs' business practices as monopolistic. The

facts of the case and the *facts* set out in defendants' brief, as distinguished from their characterizations, just do not support these charges.¹

1. THE ISSUE OF INFRINGEMENT

The concluding section of defendants' brief relating to infringement states:

"Unless this Court puts a stop to it, plaintiffs will toss out all the rules of claim interpretation and will sue and harass every firm and person who rolls a spring on a pipe, regardless of the means of doing it. Plaintiffs will have a monopoly as a result."

These are strong words. Truly, the Court should examine the acts of the plaintiffs which occasioned such expressions. They are refuted by the close similarity of the holiday detector of defendants and that shown in the Stearns patent and plaintiffs' machine and by the trial court's characterization of defendants' detector as "fundamentally a copy".

¹ Defendants characterized plaintiffs' charge of infringement and their business practices as "absurd"; "fantastically broad"; "deliberately ignore express limitations"; to construe the claims to "cover everything that will accomplish the same result"; as suggesting as a "criterion of infringement * * * something other than the claims"; as "seeking to stretch the scope of their patents beyond reasonable limits"; as relying on "general, ambiguous language" in the patent specification; as covering something called "abortive", which Stearns allegedly found "unsatisfactory" and "discarded"; as being "exaggerated fantastic construction"; as being "completely at variance with the facts"; as doing "violence to common sense"; as being a "fantastically broad interpretation"; as involving the "strange position" that wheels or rollers are "bother", "expense" and "trouble", rather than a necessity; as showing an intent by plaintiffs "to terrorize competitors"; as "overclaiming" and "functional claiming at its worst"; and as covering "a wholly new concept * * * in which the spring is no longer supported by the pipe".

(See quotation from Record, page 40 of plaintiffs' brief). Further, a careful examination of defendants' 49-page brief reveals that the only acts of plaintiffs giving rise to the above expressions are as follows:

- (a) *Plaintiffs seek a construction of claim 1 only in accordance with the ordinary meaning of its language*

As to infringement of claim 1, plaintiffs urge only that the means "rotatably engaging and - - - and for rolling said spring along such elongated member" be construed in accordance with their plain ordinary meaning to cover and be limited to a means which engages the electrode in such manner as to permit the electrode to rotate with respect to the means as it is rolled along the pipe. This plain ordinary interpretation includes the wand (P. Ex. 26-A) of defendants' structure. This claim is limited by its terms and by file wrapper estoppel to a rotatably engagement, and plaintiffs neither ignore nor seek to avoid this. Instead, plaintiffs seek exactly that construction of these words which the attorney's remarks at the time of their insertion clearly show was then intended.

Plaintiffs do object to reading into this claim, *by implication*, a further limitation that the means must have wheels or rollers, when the claim does not and never did include such limitation. Plaintiffs urge further that, where this very claim was in the application from the time the application was filed, without at any time specifying wheels or rollers, it is conclusive that the patentee did not consider his invention was limited to wheels or rollers and that there is nothing ambiguous about this language. The circumstance that the inventor Stearns first established the fact that the spring could be rolled by testing its rolling characteristics with a crude block model having no wheels or

rollers further confirms the reason for the inclusion of the broad language in the claim. After establishing the fact that the spring could be rolled by a "means rotatably engaging" the electrode, Stearns then went on to perfect what he considered to be the preferred embodiment shown in the patent drawings. His perfection of his invention does not detract from the broader aspects, nor does it constitute an abandonment of the less desirable stationary bearing-type pusher or change the literal meaning of the words "means rotatably engaging."

(b) *Plaintiffs contend claim 7 infringed by structure which admittedly includes all structure of claim and equivalent function*

As to infringement of claim 7, plaintiffs urge that defendants' device (P. Ex. 26, -A, -B and -C) which admittedly complies with the structural requirements of the claim, should not be ruled not to infringe merely because the connection between the carriage and the pusher is so flexible as to permit relative movement between them and require, for operation, that the operator hold to both the carriage and the wand instead of just the carriage. Plaintiffs urge that even though the invention of the claim is practiced imperfectly, its substance has been taken. Plaintiffs object to the action of the lower court in reading into this claim the limitation, which is not expressed, that the pusher "be a solid, rigid, immovable structure mechanically carried by and movable with the carriage." (F. of F. No. 7, R., 925)

2. THE CHARGE OF FUNCTIONALITY

The claims are charged with being functional, and this is coupled with the charge that plaintiffs' counsel, Mr.

Simms, upon questioning by the court, has urged that the claims are functional and cover any device in which a spring is rolled.

This exchange between court and counsel, when read in context, is seen to refer only to the single element of the claim that is defined in the means clause (R. 1000-1001). The claim of course has other structural recitations which limit the claim. The claim covers not merely one element but a combination of elements, only one of which is recited functionally, as permitted by statute, 35 U.S.C. 112. Plaintiffs seek only the natural and normal meaning of the claim language without either implied limitation or broadening.

Mr. Simms' statement to the trial court, as quoted at page 26 of defendants' brief, pointed out that it is necessary that the *means* "operate in the same way, do substantially the same thing, and give the same results." This is the time-tested rule for testing equivalency, and the statute, 35 U.S.C. 112, states that means clauses in claims are to be construed as covering what is shown in the patent and "equivalents thereof." Thus, Mr. Simms' statement has the sanction of statute, although characterized by defendants as "functional claiming at its worst."

3. THE CHARGE THAT THE CLAIMS ARE BEING TREATED AS A "NOSE OF WAX"

The defendants express alarm concerning the treatment of the Stearns patent claims like a "nose of wax." However, it is the defendants and the lower court that have twisted the words of the claims by implying limitations. Plaintiffs seek to have the words of the claims given precisely the interpretation which they are normally given. It is the defendants and the lower court who would *imply*

limitation of the claims to wheels and rollers in claim 1 and "a solid, rigid, immovable structure" in claim 7. No one should be "terrorized" by this except one who has appropriated the claimed invention and anticipates just retribution.

This case is similar in this regard to that before the Fifth Circuit recently in *Tubular Service v. Sun Oil Company*, 220 F. 2d 27; *cert. den.* 349 U.S. 947. In that case the defendants, as here, sought to have the patent claims read as limited to elements not recited in the claims. In the Fifth Circuit case, defendants sought an interpretation of including a centering device and specific "feeler spring" strengths on the theory that the disclosure in the patent described only one embodiment having these things and did not say that they could be omitted. The Fifth Circuit, after concluding the patented device would operate without them and had been claimed without them, stated that it saw no reason to so limit the claims where the patentee "by omitting any express reference thereto in claiming its monopoly undoubtedly sought to avoid" the imposition of such limitations and restrictions on its patent.

The Stearns patented device will operate without wheels or rollers on the pusher as is conclusively shown by defendants' devices, which admittedly meet the exact terms of claim 1. There is no contention by anyone that defendants' devices don't operate.

4. THE ISSUE OF MISUSE

(a) *The facts*

Plaintiffs, who have what they contend is a patent on a holiday detector characterized by specified electrode and pusher arrangements, lease complete detectors which in-

clude the patented invention. However, defendants contend that the patent is on an electrode, pusher and carriage combination. Plaintiffs do not sell holiday detectors, complete or otherwise, nor do they sell or lease detector parts as such. There is no evidence that plaintiffs have ever been requested to lease or sell the electrode-pusher-carriage combination alone. However, they do offer and have granted licenses on the basis of a flat royalty of \$250 for a paid-up license for the use of one electrode and pusher combination for the life of the patent. The licenses grant the permission to renew or replace the parts of the combination as many times as desired without additional royalties. Such licenses have been granted both to users and to sellers.

Defendants contend that because plaintiffs' patent claims recite only the electrode, pusher and carriage, plaintiffs must sell these elements without any of the "unpatented" parts. However, Stearns' high-voltage electric unit is a specially designed integrated part of the carriage, indivisible in any ordinary or practical sense, and there is no evidence that anybody makes or would make such a unit to fit Stearns' carriage, even if the carriage were sold separately. Actually, the electric parts are individually mounted on the carriage parts which provide the chassis. The high-voltage unit is not separately manufactured as a unit for mere insertion in the carriage. The end result is an integrated machine. This is shown by the clear plastic model of plaintiffs' machine which is in evidence (P. Ex. 17).

(b) *Legal argument*

Thus, the facts pertaining to plaintiffs' business practices are on all-fours with the recent decisions of the Second and Sixth Circuits which specifically turned down charges of

misuse in *Electric Pipeline, Inc. v. Fluid Systems, Inc.* (CA 2, 1956), 231 F. 2d 370, and *Great Lakes Equipment Co. v. Fluid Systems, Inc.* (CA 6, 1954), 217 F. 2d 613, at 616, 619.

It is submitted that Stearns' business practices, instead of being reprehensible, have been conducted upon an unusually high ethical plane. The lease agreement by which machines are leased to prospective customers imposes practically no obligation on the lessee other than the payment of rental and payment for damages beyond ordinary wear and tear. There are absolutely no restrictions, express or implied, against licensees' free purchase or lease of materials or machines from others. There is no evidence that in practice any such restrictions exist. The licenses are distinctive in their absence of most of the restrictions upon the licensee which may be legally imposed. Here again, the only obligations are the payment of royalties. Even plaintiffs' advertising, which is institutional in character, is in keeping with this high ethical level of business practice (Stearns' lease agreement, Ex. E attached to plaintiffs' main brief; Stearns' license agreements, Defs.' Exs. AA and BB attached to plaintiffs' brief; plaintiffs' advertisement, Defs.' Exs. J and K, physical exhibits).

Defendants, in support of their misuse contention, rely on

Motion Picture Patents Co. v. Universal Film Mfg. Co.,
243 U.S. 502, 510, 513; 61 L. Ed. 871, 876, 877;
Mercoird Corp. v. Mid-Continent Investment Co., 320
U.S. 661, 665, 666; 88 L. Ed. 376, 380, 381;
Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488,
493; 86 L. Ed. 363, 366;
Carbice Corp. v. American Patents Development Corp.,
283 U.S. 27; 75 L. Ed. 819;

- Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458; 82 L. Ed. 371;
Barber Asphalt Corp. v. LaFera Grecco, 116 F. 2d 211 (CA 3);
Dehydrators, Ltd. v. Petrolite Corp., 117 F. 2d 183 (CA 9);
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Cardox Corp. v. Armstrong Coalbreak Co., 194 F. 2d 376 (CA 7); *cert. den.* 343 U.S. 979; 96 L. Ed. 1371.

These cases do not support the contention that it is misuse to deal only in whole machines when the patent claims enumerates only a portion of the components of the machines. However, this contention of defendants is not a new one and has been turned down in three separate circuits. See *Electric Pipeline, Inc. v. Fluid Systems, Inc.* (CA 2, 1956), 231 F. 2d 370; *Great Lakes Equipment Co. v. Fluid Systems, Inc.* (CA 6, 1954), 217 F. 2d 613 at 616, 619; *Vulcan Mfg. Co. v. Maytag Co.* (CA 8, 1934), 73 F. 2d 136 at 138, 139.

The facts of the cases relied upon by defendants differ materially from those involved in the instant case. For instance, in the *Morton Salt* case, the patent covered a salt-dispensing machine, and it was held a misuse to condition purchases of the machines upon the purchase of unpatented salt tablets.

In the *Mercoid* case, the patent covered a stoker combination. The patentee conditioned the use of the combination upon the purchase of an unpatented control which went into the stoker but was actually separately sold.

In the *Dehydrators* case, the patent covered the method of breaking emulsions by treating them with certain chemi-

cals. Use of the patented method was conditioned upon purchase of the unpatented chemicals.

The other case relied on by defendants are of the same character as the above.

The *Cardox* case is contended by defendants to be factually similar to the case at bar. However, this just is not supported by reference to the decision. The patent covered a cartridge to be charged with compressed air. In order to obtain rights under the patent, it was necessary to contract for one year's use of a "Cardox unit." The "Cardox unit" included five of these cartridges, but then added several truckloads of pipe, couplings, a gas compressor and motor, four blow-down valves, three line valves, and three unions. The patentee contended that this was a "Cardox unit", but the court looked under that artificial grouping and recognized it to be one of the classic examples of tie-in. Here, the Stearns machine is an integrated, compact unit—obviously indivisible in fact. The title of the patent is "Insulation Testing Device", and, indeed, claim 1 recites, "An electric exploring device for detecting defects in an insulating coating on an elongated member which comprises. . . ."

To affirm the lower court in its holding of misuse would be to advance the misuse doctrine in this circuit beyond any previous holding in any court, directly opposite to the rule in the Second, Sixth, and Eighth Circuits. Further, and more importantly, it would render it nearly a physical impossibility for an article to be manufactured and sold as covered by a patent, because, carried to its logical conclusion, even a coat of paint would of necessity have to appear in the patent claim or a sale of a painted patented device would constitute a misuse.

IV. CLAIM 7 IS ENTITLED TO A RANGE OF EQUIVALENTS TO ENCOMPASS DEFENDANTS' DEVICE

File wrapper estoppel is not involved in claim 7. While it is true that the functional statement at the end of claim 7 is not met in its strictest sense by defendants' model C-3 detector in that relative movement is permitted between the wand and carriage thereof, nevertheless this difference disappears in operation, and the structural recitations of the claim are squarely met and the device functions in a manner equivalent to the "whereby" clause at the end of the claim. As a practical matter in operation, the wand and the carriage are a unit which must advance down the pipeline as a unit with a longitudinal motion, which motion is translated to the rolling of the electrode while maintaining the electrical connection. As stated in *Graver Tank Mfg. Co., Inc. v. Linde Air Products Co.*, 339 U.S. 605, 94 L. Ed. 1097, an invention is not to be limited, unless by the prior art, to "outright and forthright duplication. . . . To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form."

V. PLAINTIFFS' STATEMENT IN ITS BRIEF AS TO WHAT IS CONTENDED TO INFRINGE CLAIMS 1 AND 7 IS CLEAR

At page 7 in its brief, plaintiffs state in effect that they are restricting the contention in this appeal as to what infringes to those devices manufactured and sold by defendants prior to the filing of the complaint and which utilize the pusher and electrode exemplified by plaintiffs' Exhibits 26-A and 26-C. Defendants, in their brief com-

mening at page 24, misconstrue this statement and discuss devices which obviously are not the pusher and electrode of plaintiffs' Exhibits 26-A and 26-C. As to structures manufactured and sold by defendants since the filing of the complaint, it is submitted that they should not be considered until a supplemental complaint or new bill is filed. If plaintiffs are successful on this appeal, then, upon the filing of a supplemental complaint, a Master could appropriately go into the structures of such subsequent models to determine the extent of infringement.

Accordingly, the Court is respectfully requested to sustain plaintiffs' appeal.

Respectfully submitted,

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Certificate of Service

Three copies of the foregoing PLAINTIFFS-APPELLANTS' REPLY TO BRIEF OF TINKER & RASOR, JOHN P. RASOR AND LEO H. TINKER IN ANSWER TO PLAINTIFFS' OPENING BRIEF have been served upon Defendants-Appellees this _____ day of _____, 1956, by mailing three copies

to Edward B. Gregg, attorney of record for Defendants-Appellees, at 410 Mills Building, San Francisco 4, California, the same being the last address of Edward B. Gregg known to Appellants and Appellants' attorneys, these copies being sent through United States mail, postage prepaid.

United States Court of Appeals

FOR THE NINTH CIRCUIT

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FILED

JAN 24 1958

PAUL P. O'BRIEN, CLERK

PETITION FOR REHEARING

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Appellees

PETITION FOR REHEARING

Rehearing is sought for that part of the appeal of Dick E. Stearns et al. pertaining to the question of misuse of the Stearns patent by the D. E. Stearns Company.

Rehearing is sought based on each of the following grounds:

1. The Stearns Company by granting licenses has made available to users the Patented Apparatus, separately, and thus its business policy has complied with the recommendation of the court which appears at the top of page 23 of the opinion, namely:

“Probably the best way for an owner of such a patent to protect himself from a charge of misuse would be to offer or stand ready to offer the patented item alone.”

2. The court’s ruling of misuse is based upon Finding of Fact 51 quoted at page 20. Sections (c) and (d) of this Finding, and subsidiary Findings 54 and 55, are not supported by any evidence and are contrary to the effect of the licenses offered by the Stearns Company, which are a part of the Stearns Company’s “exclusive exploitation policy.”

3. The court having held, as stated at the top of page 23 of its opinion, that a leasing program “per se” does not prove misuse—the licenses, the legal effect of which is to give up a part of the monopoly granted by the patent, can not couple with the lease to extend the monopoly to the unpatented Electrical Apparatus.

These three grounds for rehearing will be explained in the order of their listing.

GROUND 1

The business policy of the Stearns Company includes both the leasing of its own holiday detectors and the

granting of licenses under the invention of U. S. patent 2,332,182. It is submitted that the licenses comply with this court's recommendation quoted above because by the licenses they offer the Patented Apparatus alone.

The Stearns' licenses, Defendants' Exhibits AA and BB, license only the "electrode-pusher combination." The court states that this is the scope of the licenses, at page 23 of its opinion. By Stearns' license program the Patented Apparatus is offered to a user on the following bases:

(a) Equipment suppliers may be licensed to use, lease and sell the Patented Apparatus.

(b) An ultimate consumer or customer may be licensed to make or have made and to use the Patented Apparatus.

(c) An ultimate consumer or customer may either purchase or lease the Patented Apparatus from a licensed equipment supplier.

The users of equipment thus may secure the Patented Apparatus alone or as a complete holiday detector. After granting the license and receiving the royalty, Stearns has no control over or revenue from the Patented Apparatus.

Under the Stearns' licenses, Tinker & Razor, as an equipment supplier, could have offered their Patented Apparatus both for sale and for lease. A purchaser of a Tinker & Razor Patented Apparatus would thereby receive for the royalty payment the right to use the electrode-pusher combination and any replacement parts for the life of the patent. This patented combination could be used with any Electrical Apparatus.

Under the Stearns' license to lease, Tinker & Rasor would need pay only \$250 for each Patented Apparatus in operation. For example, if they had ten such combinations under lease to others at any one time, they would make ten payments of \$250 each. If they added to the total number of their leased Patented Apparatus leased out at one time, they would make one royalty payment for each additional patented combination. These combinations could be repeatedly leased separately or as a part of a complete detector with no further royalty payment, for the life of the patent.

These same licenses were available to the ultimate consumer, who was free to make or buy the Patented Apparatus wherever he wished and to use it with any Electrical Apparatus, regardless of source.

The actual Stearns' licensees include both ultimate consumers and suppliers of equipment. (Licensees listed page 562 of Record.)

From the above it is believed clear that the licensing program of Stearns, coupled with its lease, constitutes full compliance with the court's recommendation.

GROUND 2.

From the above it will be seen that Finding 51, quoted at page 20 of the court's opinion, is clearly erroneous in that both Sections (c) and (d) failed to take into account the factual effect of the licensing program. The entire case of misuse is submitted to have been based upon this erroneous Finding.

Clearly Section (c) does not take into account the licenses which make available the Patented Apparatus irrespective of whether it is connected with or not connected with the Electrical Apparatus. Section (c) reads:

“(c) It will not make the Patented Apparatus available except in conjunction with and tied to the Electrical Apparatus.”

Likewise Section (d) is diametrically contrary to the licensing program. Section (d) reads:

“(d) It requires users to lease the apparatus as a whole.”

Thus, it is seen that the “exclusive exploitation policy” as found by the District Court in Finding 51 is clearly erroneous in view of the licensing program. This applies equally to Findings 54 and 55. These Findings were the fundamental basis of the whole theory of misuse.

GROUND 3.

Another consideration is whether the Stearns' lease and licenses are proper when considered collectively:

The court has stated at the top of page 23 of the opinion:

“The mere fact that an owner of a patented article combines the article with an unpatented article and sells or leases the unit as a whole does not *per se* prove misuse.”

No fault has been found with the provisions, per se, of the lease. The only question then is, as this court indicated on page 24 of its opinion, whether or not the licensing policy coupled with the lease provides a more effective way to extend the patent to unpatented apparatus.

If the lease were Stearns only method of doing business, all users would have to lease complete machines from Stearns or be liable as infringers. The licenses make it possible for them to obtain the Patented Apparatus separately and, therefore, serve to relinquish a part of the patent monopoly instead of extending it. The licensees may make, buy, use, lease, and sell the patented combination in any manner in which they desire and need only pay the required royalty to Stearns. In other words, Stearns thereafter has no semblance of control over or revenue from either the patented parts, the unpatented parts, or the holiday detector as a unit. Competition is completely free and unfettered.

How, then, can the licenses couple with the lease "to more effectively require one who desires to use the patented article to pay a premium on the unpatented part * * * as though the whole apparatus was patented"?

Summary

These contentions of Stearns will be recognized by the court as not newly taken, but it is believed that they present the factual effect of the licenses in a light that the court has not previously appreciated. The position of the licenses as a part of the Stearns' "exploitation policy," or business policy, is emphasized.

The question before this court is—Is it not proper for a patent owner to exploit a Patented Apparatus which forms a part of a machine by leasing the machine, and offering the Patented Apparatus separately, under non-exclusive licenses which permit utilization of the invention with no strings attached?

Respectfully submitted,

JAMES B. SIMMS
Counsel for Petitioners

Of Counsel:
H. CALVIN WHITE
BROWNING, SIMMS, HYER
AND EICKENROHT

Certificate of Counsel

It is hereby certified that in the judgment of counsel the foregoing Petition for Rehearing is well founded and is not interposed for purposes of delay.

JAMES B. SIMMS
Counsel for Petitioners

Certificate of Service

Three copies of the foregoing Petition for Rehearing were mailed to Edward B. Gregg, 410 Mills Building, San Francisco 4, California the _____ day of January, 1958.

No. 15,111

In the

United States Court of Appeals

For the Ninth Circuit

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a partnership composed of Dick
E. Stearns and Ellen Belson Stearns,

Appellants-Appellees,

vs.

TINKER & RASOR, a corporation JOHN P.
RASOR and LEO H. TINKER,

Appellants-Appellees.

Brief of Tinker & Rasor in Opposition to Stearns' Petition for Rehearing

EDWARD B. GREGG

HENRY GIFFORD HARDY

410 Mills Building
San Francisco 4, California

JOHN H. SAUNDERS

3250 E. Washington Blvd.
Los Angeles 23, California

Attorneys for Tinker & Rasor,

John P. Rasor and Leo H. Tinker

FILED

JAN 29 1958

PAUL P. O'BRIEN, CLERK

No. 15,111

In the
United States Court of Appeals
For the Ninth Circuit

DICK E. STEARNS and THE D. E. STEARNS
COMPANY, a partnership composed of Dick
E. Stearns and Ellen Belson Stearns,

Appellants-Appellees,

vs.

TINKER & RASOR, a corporation JOHN P.
RASOR and LEO H. TINKER,

Appellants-Appellees.

**Brief of Tinker & Rasor in Opposition
to Stearns' Petition for Rehearing**

The parties Dick E. Stearns and the D. E. Stearns Company (herein referred to as "Stearns") have petitioned this Court for a rehearing. The parties Tinker & Rasor, John P. Rasor and Leo H. Tinker (herein referred to as "Tinker & Rasor"), respectfully oppose Stearns' Petition on the following grounds:

This Court, in a well reasoned, carefully documented Opinion which goes into the facts and law of the case in an exceptionally thorough manner, has concluded that Stearns' policy of leasing only complete machines (which include patented parts represent-

ing only 10% of the cost of a complete machine; see page 21 of the Opinion), and Stearns' policy of refusing to lease or sell the patented parts apart from the unpatented parts, is a misuse of the patent.

Stearns' Petition does not dispute this holding of the Court. The only contention made by Stearns is as follows: In addition to leasing complete machine, Stearns also licenses the patented parts without any tie-in to the unpatented parts. This Court has held that Stearns' licensing policy *per se* is not a misuse. Stearns argues that the lawful licensing policy takes the sting out of, and therefore legalizes the leasing policy.

To sustain this position Stearns must show:

(1) That, as a matter of law, a leasing policy which is unlawful *per se* becomes lawful if the patentee also has a lawful licensing policy.

(2) That, as a matter of fact, the lawful licensing policy relieves the ill effects of the unlawful leasing policy.

Stearns has presented no authority to sustain point (1) and no facts to sustain point (2).

Thus, no cases are cited to show that a misdeed, such as unlawful leasing, plus a "good deed", such as lawful licensing, equals a good deed; i.e., that $2 + 2 = 5$.

As to the effect of the lawful licensing on the unlawful leasing, Stearns' Petition neglects to refer to the following statement in this Court's Opinion at page 24.

"The finding of misuse by the trial court as to the licensing agreements standing alone is clearly erroneous. However, it couples with the policy of leasing and to sales in such a way as to more effectively require one who desires to use the patented article to pay a premium on the unpatented part of the complete apparatus as though the whole apparatus was patented."

Clearly, this Court has held that the licensing policy, although not unlawful by itself, couples with and reinforces the illegality of the leasing policy. This is a holding quite the opposite of Stearns' contention, that his licensing policy relieves the ill effects of his leasing policy.

For the foregoing reasons Tinker & Rasor respectfully submit that Stearns' Petition is without merit and should be denied.

EDWARD B. GREGG

HENRY GIFFORD HARDY

410 Mills Building
San Francisco 4, California

JOHN H. SAUNDERS

3250 E. Washington Blvd.
Los Angeles 23, California

*Attorneys for Tinker & Rasor,
John P. Rasor and Leo H. Tinker*

Certificate of Service

Three copies of the within brief were served upon Dick E. Stearns and the D. E. Stearns Company on the 30th day of January, 1958 by mailing three copies to H. Calvin White at 611 Wilshire Blvd., Los Angeles 17, California, attorney of record for the said parties, the same being the last address of said H. Calvin White known to the undersigned, such copies being sent through United States mail, postage prepaid.

EDWARD B. GREGG

No. 15114

United States
Court of Appeals
for the Ninth Circuit

CHARLES J. FRIDAY, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Southern Division

FILED

JUN 11 1956

PAUL P. O'BRIEN, CLERK

No. 15114

United States
Court of Appeals
for the Ninth Circuit

CHARLES J. FRIDAY, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FREDRICKS & ROBERTS,

Fidelity Building,

Boise, Idaho,

Attorneys for Appellant

SHERMAN F. FUREY, JR.,

United States Attorney,

MARION J. CALLISTER,

Assistant U. S. Attorney,

Federal Building,

Boise, Idaho,

Attorneys for Appellee

In the United States District Court, District
of Idaho, Southern Division

No. 3121

CHARLES J. FRIDAY, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

I.

This is a tort claim asserted by Plaintiff against the United States of America under the provisions of Title 28 United States Code, Section 1346 (b).

II.

That all of the acts or omissions hereinafter complained of by the Plaintiff were committed within the Southern Division of the Federal District of Idaho.

III.

That on the 30th day of October, 1953, at approximately 8:00 A.M. of said day, the Plaintiff, Charles J. Friday, was driving his certain 1951 Kaiser 2- door sedan automobile in a lawful manner in a westerly direction on U. S. Highway 30 at a point on said highway approximately $3\frac{1}{2}$ miles west of Boise, Ada County, Idaho; that at said time and place, one Ralph Lacy, was driving a certain Willys Jeep automobile in an easterly direction along said highway; that at said time and place, one Francis E. Fennert, negligently, carelessly and recklessly

drove a certain Chevrolet panel truck belonging to the United States of America with great force into the rear of the vehicle being driven by the said Ralph Lacy and thereby propelled the said vehicle driven by the said Ralph Lacy across the center line of said highway into the path of and directly into Plaintiff's said automobile causing the said automobiles to collide, destroying Plaintiff's automobile and causing severe and permanent injuries to Plaintiff.

IV.

That said Chevrolet panel truck was at that time being driven by the said Francis E. Fennerty, and was, at said time, owned by and was the property of the United States of America; that said Francis E. Fennerty was, at that time, an employee of the United States of America, and was then and there acting in the scope of his office and employment on behalf of the said United States of America; that the United States, acting by and through its agents and servants, and in particular, its agent and servant, S. W. Wells, was negligent, reckless and careless in directing the said Francis E. Fennerty to drive said government vehicle to a certain government soil and water testing project near Caldwell, Idaho, the evening of October 29, 1953, and was negligent, reckless and careless in authorizing and directing the said Francis E. Fennerty to remain on said project and continuously work throughout the night of October 29, 1953, and to thereafter drive said government vehicle from that point and return to Boise, Idaho, which he was doing at the time of

the above described collision without allowing the said Francis E. Fennerty to obtain sufficient sleep or rest before his return to Boise, Idaho, and that the fatigued condition of the said Francis E. Fennerty was a contributing factor to the negligent and careless operation of said United States' vehicle prior to and at the time of the collision with the automobile of Plaintiff.

V.

As a result of said collision, the above described 1951 Kaiser automobile belonging to Plaintiff was destroyed to the damage of Plaintiff in the sum of \$1120.00; that by reason of said collision and as a proximate result of the negligence of the Defendant, and of the said Francis E. Fennerty, and of the immediate supervisor of the said Francis E. Fennerty, to-wit, S. W. Wells, the Plaintiff suffered fractures of the 5th, 6th, 7th and 8th ribs on the right side, contusions in the anterior chest and sternal areas, dislocation or subluxation of the right hip, fractures of the posterior acetabular lip, abrasions and contusions in the right pre-tibial area, contusions and severe injuries to the external popliteal nerve and other nerves, multiple contusions, lacerations, and severe shock, and suffered great pain, loss of sleep and permanent and crippling injuries to the right leg and hip, which injuries necessitated hospitalization and medical care; that Plaintiff has to date hereof expended the sum of \$266.85 for his medical care and hospitalization to his damage in the sum of \$266.85; that Plaintiff has not recovered from the injuries which he suffered in said accident and con-

tinues to require medical care and has incurred and suffered crippling and permanent injuries resulting in at least a permanent 50% loss of Plaintiff's wage earning ability to his damage in the sum of \$60,000.00.

VI.

That said Francis E. Fennerty just prior to the time of the collision had negligently and carelessly fallen asleep while driving the said United States Government vehicle; that one S. W. Wells was an employee of the United States Government then employed in the U. S. Geological Survey, Ground Water Branch, and was the immediate supervisor of the said Francis E. Fennerty and had negligently, recklessly and carelessly required and compelled the said Francis E. Fennerty to drive the said United States Government vehicle without adequate rest and sleep, and under the circumstances of the collision, the said Francis E. Fennerty as a private person, and the said S. W. Wells as a private person would be liable to Plaintiff for the damages resulting from their negligence and the resulting collision, and the United States of America, if a private employer, would be liable to Plaintiff for such damages suffered from said accident.

Wherefore, Plaintiff prays judgment against the United States of America for the sum of \$61,386.85, together with costs incurred herein.

FREDRICKS & ROBERTS,

/s/ By THERON E. ROBERTS,

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 12, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America and answers plaintiff's complaint as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The Court lacks jurisdiction of any claim based on the alleged negligent acts of Francis E. Fennerty's supervisor set out in the complaint for the reason that if the said supervisor performed the alleged acts it was in the performance of a discretionary function or duty and suit is prohibited by the provisions of 28 USC 2680(a).

Third Defense

I.

Defendant admits the allegations contained in paragraph I.

II.

Defendant denies the allegations contained in paragraph II.

III.

Answering paragraph III defendant admits that at approximately the time and place mentioned in plaintiff's complaint that Francis E. Fennerty was

driving a certain Chevrolet panel truck belonging to the United States of America travelling in an easterly direction along Highway 30; that one Ralph Lacy was driving a certain Willys Jeep automobile in an easterly direction along said highway; that Charles J. Friday was driving a certain 1951 Kaiser two-door sedan automobile in a westerly direction on said highway; and that the said Chevrolet panel truck struck the rear of said Jeep; and that said Jeep collided with said 1951 Kaiser automobile; and defendant denies each and every other allegation of paragraph III.

IV.

Answering paragraph IV defendant admits that said panel truck was the property of the defendant on the 30th day of October, 1953, and was being operated by Francis E. Fennerty, who was an employee of the defendant on that date, and denies each and every other allegation contained in paragraph IV of the complaint.

V.

Answering paragraph V defendant admits that by reason of the collision of the aforesaid Jeep and Kaiser automobile that the plaintiff suffered fractures of the fifth, sixth, seventh and eighth ribs on the right side, and a simple fracture of the posterior acetabalar rim on the right side. Defendant specifically denies that said injuries were the result of the negligence of the defendant and of Francis E. Fennerty and of the immediate supervisor of the said Francis E. Fennerty: and further denies that plain-

tiff suffered crippling and permanent injuries. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph V of the complaint, and therefore denies each and every other allegation in said paragraph V.

VI.

Defendant denies each and every other allegation contained in the complaint.

Fourth Defense

Any injuries sustained or suffered by plaintiff at the time and place and on the occasion mentioned in the complaint were caused in whole or in part or were contributed to, by the negligence or fault or want of care of the plaintiff, and not by any negligence or fault or want of care on the part of Francis E. Fennerty, his supervisor, or this defendant.

Fifth Defense

Plaintiff, on or about the 7th day of December, 1953, for a valuable consideration, duly executed and delivered to Francis E. Fennerty, the employee of the defendant referred to in the complaint of the plaintiff, a general release in writing, whereby the plaintiff duly released the said Francis E. Fennerty therefrom, and forever discharged him from the alleged cause of action set forth in the complaint, and from any and all claims of the plaintiff against the said Francis E. Fennerty. The said release by its

terms released the defendant and forever discharged it from the alleged cause of action set forth in the complaint, and from any and all claims of the plaintiff against the defendant. A copy of the release is attached hereto as Exhibit A.

Sixth Defense

Prior to the commencement of this action and on or about the 7th day of December, 1953, the said Francis E. Fennerty, the employee of the defendant, duly paid, satisfied and discharged the claim of the plaintiff set forth in the complaint herein by payment to the plaintiff of the sum of \$5,000.00.

SHERMAN F. FUREY, JR.,
United States Attorney

/s/ By MARION J. CALLISTER,
Assistant U. S. Attorney

EXHIBIT A

RELEASE IN FULL

For and in consideration of the sum of Five Thousand (\$5,000.00) and other valuable considerations, the receipt of which is hereby acknowledged, the undersigned do hereby release and forever discharge Francis E. Fennerty and Phyllis C. Fennerty, jointly and severally, from any and all claims, demands, damages, expenses, costs, causes of actions and suits growing out of and arising by reason of that certain accident which occurred on or about October 30, 1953, on U. S. Highway 30, at or near

2 $\frac{1}{2}$ miles west of Boise, Ada County, Idaho, inflicting upon the undersigned serious personal injuries and property damages.

It is understood and agreed that this is a full and final release of all liability of whatever character, kind or nature, growing out of the above captioned accident by reason of personal injuries and property damages sustained by the undersigned as against the said Francis E. Fennerty and Phyllis C. Fennerty.

It is further understood and agreed that payment hereunder is not and shall not be construed as admission of liability by the said Francis E. Fennerty and Phyllis C. Fennerty and that this is a full, complete and final compromise settlement of disputed claims as between the parties hereto.

It is further understood and agreed that this release, as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tortfeasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tortfeasor or tortfeasors causing or contributing to the damages and injuries suffered by the undersigned.

Dated this 7th day of December, 1953, at Seattle, State of Washington.

CHARLES J. FRIDAY
DOROTHY W. FRIDAY

Witness:

FRED C. MATHERRY

Subscribed and sworn to before me this 7th day of December, 1953, at Seattle.

THOS. MARSHALL,

Official Title: Notary Public in and for the State of Washington, residing at Seattle.

Affidavit of Service Attached.

[Endorsed]: Filed Feb. 14, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant, United States of America, requests plaintiff, Charles J. Friday, within 10 days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the Release attached to the Answer of the defendant as Exhibit A is a true and correct copy of the Release executed by the plaintiff, Charles J. Friday, and his wife, Dorothy W. Friday, on or about the 7th day of December, 1953.

2. That said Release was, for a valuable consideration, duly executed by Charles J. Friday and his wife, Dorothy W. Friday, and delivered to Francis

E. Fennerty on or about the 7th day of December, 1953.

3. That Francis E. Fennerty referred to in the Complaint as an employee of the defendant, United States of America, is the same Francis E. Fennerty referred to in the said Release.

4. That the accident referred to in said Release is the same accident referred to in the Complaint of the Plaintiff filed herein.

SHERMAN F. FUREY, JR.,
United States Attorney

/s/ By MARION J. CALLISTER,
Assistant U. S. Attorney

Affidavit of Service Attached.

[Endorsed]: Filed Mar. 24, 1955.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

Comes now Plaintiff, Charles J. Friday, and for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, and makes the admissions requested by Defendant as follows, to-wit:

1. That the Release attached to Defendant's Answer as "Exhibit A" is a true and correct copy of the release executed by the Plaintiff, Charles J. Fri-

day, and his wife, Dorothy W. Friday, or or about the 7th day of December, 1953.

2. That said Release was, for a valuable consideration, duly executed by Charles J. Friday and his wife, Dorothy W. Friday, and delivered to Francis E. Fennerty on or about the 7th day of December, 1953.

3. That Francis E. Fennerty referred to in the Complaint is an employee of the Defendant, United States of America, and is the same Francis E. Fennerty referred to in the said release.

4. That the accident referred to in the said release is the same accident referred to in the Complaint the Plaintiff filed herein.

Dated this 4th day of April, 1955.

FREDRICKS & ROBERTS

/s/ By THERON E. ROBERTS,
Attorneys for Plaintiff

Receipt of Copy Attached.

[Endorsed]: Filed Apr. 6, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, United States of America, hereby moves the court to enter summary judgment for the defendant, in accordance with the provisions of Rule 56(b) and (c) of the Rules of Civil Procedure, on the ground that the pleadings and admissions on file

herein show that the defendant is entitled to judgment as a matter of law.

SHERMAN F. FUREY, JR.,

United States Attorney

/s/ By MARION J. CALLISTER,

Assistant U. S. Attorney

Affidavit of Service Attached.

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Clark, District Judge.

This is an action brought by the plaintiff under the Tort Claims Act. The plaintiff allegedly was injured in a three-car collision in which one Francis E. Fennerty, driving a vehicle belonging to the United States, drove this said vehicle into the rear of a car driven by one Ralph Lacy propelling the latter's vehicle across the highway center line into the path of this plaintiff's auto, causing them to collide.

The defendant has pleaded a release executed by the plaintiff herein and his wife to Francis E. Fennerty, the employee of the defendant, whereby the plaintiff duly released the said Francis E. Fennerty from any claims. The plaintiff in response to requests for admission admits the execution of the Release for a valuable consideration. Upon these ad-

missions and the pleadings herein, the defendant moved for Summary Judgment. The Court has fully considered the same together with briefs and oral argument. There is no material dispute as to the facts.

The plaintiff contends that in addition to the negligence of Fennerty, Fennerty's immediate superior, one S. W. West, was negligent in directing Fennerty to drive this vehicle to a place near Caldwell, Idaho, and work there the night of October 29, 1953, and to return to Boise without allowing the said Fennerty to obtain sufficient sleep or rest.

The act of the supervising officer was certainly not a proximate cause of the accident in question. Further this act, being discretionary, would come within the classification of suits prohibited by the statute. *Dalehite v. United States*, 346 U.S. 15.

The only person's acts then, through which the United States could be held liable, are the acts of Fennerty. The release particularly releases Fennerty but states that it "shall not inure to the benefit of any other tortfeasor, upon whom and against whom a liability may be predicated by reason of independent negligence of, act by, or liability on the part of said other tortfeasor or tortfeasors."

The law puts master and servant relations in the position to be held as joint tortfeasors in situations such as this, not independent tortfeasors, and therefore the Government, as the employer in this case, has been fully released by the Release on file herein. The release to the servant necessarily releases the employer. *U. S. vs. First Security Bank of Utah*,

208 F. 2d 424; Johns v. Hake, 131 Pac. 2d 933 (Wash.).

For these reasons the Motion for Summary Judgment should be granted. Counsel for Defendant may prepare and submit Judgment.

January 9, 1956.

[Endorsed]: Filed Jan. 10, 1956.

In the United States District Court for the District
of Idaho, Southern Division

No. 3121

CHARLES J. FRIDAY, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

SUMMARY JUDGMENT

The motion of the defendant for summary judgment pursuant to Rule 56(c) of the Rules of Civil Procedure, having been presented, and the court being fully advised,

The court finds that the defendant is entitled to a summary judgment as a matter of law.

It Is Therefore Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is granted, that the plaintiffs have and recover nothing by their suit, that the

defendant, United States of America, go hence without day, and that defendant recover its costs and charges in this behalf expended and have execution therefor.

Dated this 18th day of January, 1956.

/s/ CHASE A. CLARK,
Chief Judge, U. S. Dist. Ct.

[Endorsed]: Filed Jan. 20, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Charles J. Friday, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 20th day of January, 1956.

FREDRICKS & ROBERTS
/s/ By THERON E. ROBERTS,
Attorneys for Appellant,
Charles J. Friday

[Endorsed]: Filed Mar. 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers is the complete original record filed in this office in this case, to-wit:

1. Complaint
2. Summons with return thereon
3. Motion and Order for Additional Time to Answer
4. Answer
5. Request for Admissions
6. Answer to Request for Admissions
7. Motion for Summary Judgment
8. Minutes of the Court of August 22, 1955
9. Memorandum Opinion
10. Summary Judgment
11. Notice of Appeal
12. Cost Bond on Appeal
13. Stipulation to send complete record to Court of Appeals

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 24th day of April, 1956.

[Seal] ED. M. BRYAN,
 Clerk.

[Endorsed]: No. 15114. United States Court of Appeals for the Ninth Circuit. Charles J. Friday, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: April 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15114

CHARLES J. FRIDAY, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

STATEMENT OF POINTS ON APPEAL

The Points upon which Appellant will rely on appeal are:

1. The Court erred in finding that Defendant was entitled to a summary judgment as a matter of law.
2. The Court erred in granting Defendant's motion for summary judgment.
3. The Court erred in holding that the Defendant

was not liable under the Tort Claims Act for the negligent acts as set forth in Appellant's Complaint of S. W. West, a United States Government employee, and in holding that the acts of S. W. West were not the proximate cause of Appellant's injuries and in holding that such acts were discretionary and therefore within the classification of suits prohibited by the Tort Claims Act.

4. The Court erred in holding that the release of Francis E. Fennerty, a United States Government employee, released also the United States Government from liability to Plaintiff under the Tort Claims Act.

Dated this 25th day of April, 1956.

FREDRICKS & ROBERTS

/s/ By THERON E. ROBERTS,
Attorneys for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed April 26, 1956. Paul P. O'Brien, Clerk.

IN THE
United States
Court of Appeals
For the Ninth Circuit

CHARLES J. FRIDAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

*Appeal from the United States District Court
for the District of Idaho, Southern Division*

FREDRICKS & ROBERTS,
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FILED

IN THE
United States
Court of Appeals
For the Ninth Circuit

CHARLES J. FRIDAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

*Appeal from the United States District Court
for the District of Idaho, Southern Division*

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*Appeal from the United States District Court
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STATEMENT OF CASE

Appellant, Charles J. Friday, brought this action against the Appellee, United States of America, hereinafter called Government, under the provisions of the Tort Claims Act, Title 28, United States Code, Section 1346 (b), alleging that he was severely injured and permanently crippled in an automobile collision caused by the negligence of one of the Government's employees driving a truck belonging to the Government, and further, that the negligence

of a second employee of the Government was a contributing cause of the collision. Appellant alleged that both employees of the Government were acting within the course and scope of their employment for the Government at the time of their claimed acts of negligence (R 3-6). To this Complaint the Government filed Answer admitting that it employed the aforesaid employees, admitting the ownership of the truck and admitting the occurrence of the collision and that Appellant suffered certain injuries as claimed by him (R 7-8). The Government, by its Answer, generally denied all other allegations of the Complaint and set up the following additional defenses:

1. That the Court lacked jurisdiction over any claim based upon the negligence of one of its aforesaid employees for the reason that the alleged acts of that particular employee were in the performance of a discretionary function and suit was prohibited by the provisions of 28 USCA 2680(a) (R 7).

2. That the Government was released from all liability to Appellant by an instrument in writing given by Appellant and his wife to the aforesaid driver of the Government truck and his wife, releasing the driver and his wife from all liability to Appellant arising out of the collision. The release was set out verbatim in the Government's Answer (R 9-11).

The Government then filed requests for admissions asking Appellant in substance to admit his execution of the release for a valuable consideration, and that it ran in favor of one of the aforementioned

Government employees, which admissions Appellant made (R 12-14).

Appellee then moved for summary judgment (R 14-15), which motion the Court granted and judgment was subsequently entered in favor of the Government and against Appellant on January 20, 1956 (R 17-18). From this judgment Appellant has appealed (R 18).

JURISDICTION

Jurisdiction of the District Court is based upon Title 28, Section 1346 (b), United States Code Annotated, this being a civil action against the United States, for money damages accruing after January 1, 1945, for personal injury and loss of property caused by the negligent acts of employees of the Government while acting within the scope of their employment under circumstances where the United States, if a private person, would be liable to Appellant under the laws of Idaho where the negligent acts occurred.

This Court has jurisdiction to review the case on appeal by reason of Title 28, Sections 1291, 1293, 1294 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

This is an appeal from a Summary Judgment entered in the United States District Court for the District of Idaho against the Appellant (Plaintiff),

Charles J. Friday, and in favor of the Government (Defendant), United States of America.

Appellant brought this action pursuant to the Tort Claims Act and Summary Judgment was granted before trial after the matter was at issue.

Plaintiff's Complaint alleged in substance that Francis E. Fennerty, an employee of the Government, was, in the course and scope of his employment, driving a certain truck belonging to the Government in an easterly direction along U. S. Highway 30, three and one-half miles West of the City of Boise, Idaho; that Fennerty negligently drove the Government truck into the rear of a certain jeep being driven by one Ralph Lacy and propelled the jeep across the center line of the highway and into the path of Appellant's automobile then being driven by Appellant in the opposite direction along the highway; and that as a result of this three car collision, the Appellant was badly injured and permanently crippled in certain particulars, more particularly set out in the Complaint, and Appellant incurred certain doctor, medical and hospital bills and loss of his automobile. Appellant's Complaint further charges that S. W. West, another employee of the Government and the immediate supervisor of Fennerty, negligently authorized and directed Fennerty to drive the truck at the aforesaid time and place when Fennerty was in a fatigued condition, directing Fennerty to drive the truck without allowing him to obtain sufficient rest before doing so; and that Fennerty fell asleep while driving the truck; and that falling asleep due to his fatigued condition

combined with other negligence of Fennerty, caused the collision and Appellant's injuries and damage in the total amount of \$61,386.85 (R 3-6).

The Government filed Answer to Appellant's Complaint, making certain admissions and denials not pertinent to questions involved in this appeal and pleaded as Exhibit "A" a release executed by Appellant and wife to Francis E. Fennerty and wife (R 7-12), and filed requests for admissions (R 12-13), which requests in substance were that the parties to the release were the same parties as involved in the collision and as named in Appellant's Complaint, and that the release was a true copy of the original and executed for a valuable consideration. Appellant subsequently made the admissions requested (R 13-14). The Government then moved for Summary Judgment, which was granted upon three grounds (R 15-18). They are:

1. That the act of S. W. West in compelling Francis E. Fennerty to drive a Government vehicle when Francis E. Fennerty was in a tired and fatigued condition and unfit to be driving, could not be a proximate or contributing cause of the collision and Appellant's injuries.

2. That the acts of S. W. West were discretionary acts and thus within the classification of suits prohibited by the Tort Claims Act, 28 USCA 2680 (a).

3. That the release by Appellant of Francis E. Fennerty, released likewise the Government, despite the reservations in the release.

Since the exact language employed in the release to Fennerty will be constantly referred to and is

directly involved in a determination of at least a part of the questions raised on this appeal, we set forth the full text of the release.

RELEASE IN FULL

For and in consideration of the sum of Five Thousand Dollars (\$5,000.00) and other valuable consideration, the receipt of which is hereby acknowledged, the undersigned do hereby release and forever discharge Francis E. Fennerty and Phyllis C. Fennerty, jointly and severally, from any and all claims, demands, damages, expenses, costs, causes of actions and suits growing out of and arising by reason of that certain accident which occurred on or about October 30, 1953, on U. S. Highway 30, at or near two and one-half miles west of Boise, Ada County, Idaho, inflicting upon the undersigned serious personal injuries and property damages.

It is understood and agreed that this is a full and final release of all liability of whatever character, kind or nature, growing out of the above captioned accident by reason of personal injuries and property damages sustained by the undersigned as against the said Francis E. Fennerty and Phyllis C. Fennerty.

It is further understood and agreed that payment hereunder is not and shall not be construed as admission of liability by the said Francis E. Fennerty and Phyllis C. Fennerty and that this is a full, complete and final compromise settlement

of disputed claims as between the parties hereto.

It is further understood and agreed that this release, as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tortfeasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tortfeasor or tortfeasors causing or contributing to the damages and injuries suffered by the undersigned.

Dated this 7th day of December, 1953, at Seattle, State of Washington.

CHARLES J. FRIDAY
DOROTHY W. FRIDAY

Witness:

FRED C. MATHERRY

Subscribed and sworn to before me this 7th day of December, 1953, at Seattle.

THOS. MARSHALL

Official Title:

Notary Public in and
for the State of Wash-
ington, residing at
Seattle.

The above facts briefly stated are the necessary facts for a determination of the issues presented in this appeal.

SPECIFICATIONS OF ERROR

1. The District Court erred in granting Summary Judgment in favor of the Government and in adjudging that the Government was entitled to Summary Judgment, as a matter of law, upon the pleadings and records in the case.

2. The District Court erred in ruling, without having heard the evidence, that the acts of S. W. West in compelling Francis E. Fennerty to drive a Government vehicle upon a public highway when Francis E. Fennerty was in a fatigued condition and unfit to be driving, could not be a proximate cause of the collision and Plaintiff's injuries.

3. The District Court erred in ruling, without having heard the evidence, that the acts of S.W. West were discretionary acts and thus within the classification of suits prohibited by the Tort Claims Act.

4. The District Court erred in ruling that the release given by Appellant and wife to Francis E. Fennerty and wife released the Government from all liability to Appellant under the Tort Claims Act.

STATEMENT OF ISSUES

1. Was Appellant entitled under the allegations of his Complaint to present evidence on the issue of whether the negligence of the Government employee, S. W. West, was a contributing proximate cause of the accident?

2. Did the District Court err in ruling that the acts of the Government employee, S. W. West, were

discretionary acts and within the classification of suits prohibited by the Tort Claims Act, 28 USCA 2680 (a), when the Court had nothing before it by way of allegations, admissions or evidence to indicate the relationship of the Government employee, West, to Government employee, Fennerty, except that West was the immediate supervisor of Fennerty and without having before the Court by way of allegations, admissions or evidence any facts concerning the kind, character or nature of the Government function and employment being performed by West and Fennerty?

3. Did the release given by Appellant and wife to Fennerty and wife release the Government's liability to Appellant under the Tort Claims Act despite the following reservations in the release:

"It is further understood and agreed that this release as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tort-feasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feasor or tort feasors causing or contributing to the damages and injuries suffered by the undersigned"?

ARGUMENT

The question to be determined on this appeal is whether the District Court correctly granted Summary Judgment in favor of the Government upon the pleadings and other documents constituting the records of the case.

The Summary Judgment was granted upon three grounds, each of which we maintain were erroneous. These grounds are:

A. That a supervisor's acts in requiring an employee to drive a motor vehicle when the employee is so fatigued as to be in an unfit condition to drive could not, as a matter of law, constitute actionable negligence.

B. That the acts of a Government supervisor in directing an employee to drive a Government vehicle is a discretionary act, and suit for such act is barred by the Tort Claims Act, 28 USCA 2680 (a).

C. That a release of a Government employee, even though the release is limited to the employee, necessarily releases the Government from liability under the Tort Claims Act.

In the interest of clarity, we will discuss these propositions separately and in the order above listed.

A.

A person undertaking to drive an automobile, knowing that he is fatigued and sleepy, is acting negligently and his conduct, if it results in injury to others, constitutes actionable negligence.

Curtis et al vs. Curtis, 58 Idaho 76, 70 P 2d 369.

It is a matter of common knowledge that inertia and drowsiness superinduced by loss of sleep and physical or mental fatigue renders a driver incapable of properly and safely operating an automobile and results daily in serious accidents.

Reynolds Adm'x vs. Waggoner, 111 S.W. 2d 647, 271 Ky. 300.

That the above proposition is well settled law is illustrated by the large number of cases holding that a guest who will ride in an automobile, knowing the driver to be sleepy, is guilty of contributory negligence if he is injured as a result of the driver's falling asleep at the wheel, and the recovery by the guest is barred. The question is one of fact for the jury to determine. The following cases serve as illustrative examples:

Curtis et al vs. Curtis, 58 Idaho 76, 70 P 2d 369;

Reynolds Adm'x vs. Waggoner, 111 S.W. 2d 647, 271 Ky. 300.

It is well settled basic law that a person who places an automobile in the hands of an incompetent driver whom he knows, or in the exercise of ordinary care should know, to be incompetent to drive the automobile safely is liable for injuries caused by the driver's incompetence; and such conduct constitutes action-

able negligence. Late cases announcing this rule are annotated in

31 ALR 2d 1445, at page 1457.

Under such circumstances the master is liable for the conduct of the servant in permitting an incompetent driver to operate the vehicle.

The Idaho Supreme Court has ruled that the act of a driver in falling asleep may not only constitute simple negligence, but may even constitute gross negligence,

Curtis et al vs. Curtis, 58 Idaho 76, 70 P 2d 369

so, also, the act of a supervising employee directing an incompetent employee to operate a vehicle on the public highways could constitute not only actionable negligence but even gross negligence.

The general rule is that a person is chargeable with actionable negligence when he knowingly entrusts the operation of an automobile to an incompetent driver.

MacCalla vs. Grosse, 109 Pac. 2d 358, 42 Cal. App. 2d 546;

Golemds vs. Blumbers, 262 App. Div. 759, 27 NYS 2d 692;

Hale vs. Worthington, 130 NJL 162, 31 A 2d 844.

From the foregoing cases and citations it is apparent that the District Court erred in ruling as a

matter of law that Appellant could not predicate liability on the Government for its action in directing a sleepy and fatigued employee to drive an automobile. Appellant's Complaint charged that Appellant was injured as a result of the negligence of a Government employee directing an inferior employee, in a tired and fatigued condition, to drive a Government vehicle upon the public highway; that the tired, fatigued employee fell asleep while driving and injured Appellant (R 3-6). The acts of the supervising employee clearly, as a matter of well settled law, could well constitute actionable negligence, depending upon the exact facts and circumstances proven by Appellant at the trial. While an automobile, for most purposes, is not considered by the Court to be a dangerous instrumentality so as to make its user absolutely liable in all circumstances, yet the operation of an automobile on a public highway is sufficiently hazardous to require a person operating or directing the operation of an automobile, in the exercise of ordinary care, not to permit such operation by a person sleepy and fatigued to the extent that the driver's faculties and reactions are dulled. To permit and direct such operation of an automobile creates a dangerous situation extremely likely to result in harm and injury to others, and obviously such conduct constitutes actionable negligence. The evidentiary facts showing the exact circumstances surrounding the supervisor's acts were, of course, not pleaded; and the District Court reached an arbitrary, unwarranted conclusion in deciding this issue without evidence upon which to base a decision.

B.

The second ground or basis for granting Summary Judgment was that S. W. West, an employee of the Government in the U. S. Geological Survey, Ground Water Branch, was, at the time of directing Government employee Fennerty to drive the Government truck, acting in the discharge of a discretionary function or duty; and suit was barred by the Tort Claims Act.

So far as material to the determination of this point, the Act, Title 28 USCA Section 2680 (a), provides:

“The provisions of this Chapter and Section 1346 (b) of this Title shall not apply to:

“(a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government whether or not the discretion involved be abused.”

In this case the general function or duty of the Government being performed or engaged in for the Government by Government employee West does not appear from the pleadings or record in the case, so that it is impossible to determine positively, from the pleadings and record in this case, whether or not the function or duty was discretionary. All that ap-

pears from the pleadings is Appellant's allegation that one Government employee, acting within the scope of his employment, directed and authorized another Government employee to drive a Government truck to a Government installation and return (R 4-5). Whether this was done in connection with a discretionary function does not appear in the record; and the District Court's conclusions that a discretionary function or duty was involved was entirely arbitrary and not in any way supported by the record. It was clearly error for the District Court to rule against Appellant without having in the record any basis whatsoever for the ruling. Whether or not a discretionary function or duty of the Government was involved will depend upon proof to be adduced at the trial or upon facts brought out by appropriate discovery proceedings.

The Government, by its Answer, claimed the function or duty of employee West to be a discretionary one within the meaning of the Act (R 7). But an allegation in an Answer certainly is not proof, and the allegation standing alone is not sufficient to support a Judgment. The Government's allegation was one in defense, and there is no proof or facts before the Court to support it. As the record stands, it is a bare assertion and nothing more.

When issues of fact remain undetermined, they must be determined

88 C.J.S. p. 21, note 53;

89 C.J.S. p. 418, note 54;

46 C.J. p. 1224, note 60;

Clair et al vs. Sears Roebuck & Co., 34 F. Supp.
559;

Van Wormer vs. Champion Paper & Fiber Co.,
28 F. Supp. 813;

Refractolite Corp. vs. Prismo Holding Corp.,
25 F. Supp. 965.

by proof

Frank Adam Electric Co. vs. Westinghouse
Electric Mfg. Co., 146 F (2) 165;

Donnelly Garment Co. vs. National Labor Re-
lation Board, 123 F (2) 215, 224.

presented by sworn testimony or by agreement of
counsel

89 C.J.S. p. 373, note 36.

Any decision on the issues of fact must be based on
evidence admitted in the case

89 C.J.S. p. 417, note 46.

So far as appears from the pleadings and record
in this case, the only Government function or duty
involved was the normal routine performance of a
required duty, i.e., the assigning of an employee to
a particular task. That such function or duty is not
what is meant by discretionary function or duty is
clearly pointed out in the following cases:

Somerset Seafood Co. vs. United States, 193 F.
2d 631;

Costly vs. United States, 181 F. 2d 723.

Once having undertaken the performance of the duty, the discretion, if any existed, has been exercised. This point is clearly illustrated by the factual situation in both the above cases. See also

Johnson vs. District of Columbia, 118 U.S. 19,
6 S. Ct. 923, 30 L.E.D. 75;

Toledo vs. United States, D.C. 95 F. Supp. 838;

Dishman vs. United States, D.C. 93 F. Supp.
567, 571;

United States vs. Gray, 199 F. 2d 239;

Grigalaukas et al vs. United States, 103 F.
Supp. 543.

The District Court and the Government rely heavily upon

Dalehite vs. United States, 346 U.S. 15;

the case involving the Texas City disasters. The United States Supreme Court, in that case, considered discretionary functions and duties within the Tort Claims Act at great length. It is apparent from a study of that decision that the Dalehite case confirms Appellant's position in this case rather than the position of the Government.

Speaking of what is meant by discretionary function or duty of the Government within the meaning of the Act, the Supreme Court states on page 42 of the decision :

“In short the alleged ‘negligence’ does not subject the Government to liability. The decisions held culpable were all responsibly made at a plan-

ning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program";

and again on page 30 the Court, speaking of exempted discretionary functions, states:

"This paragraph characterizes the general exemption as a highly important exception designed to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of the Government's agent is shown and the only ground for suit is the contention that the same conduct by a private individual would be tortious. . . The Bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion."

Thus it is clear that the mere authorization by one Government employee to drive a Government vehicle is not the discretionary function or duty exempted from the Act, but is rather the type conduct for which suit was specifically authorized by the Act. Employee West's conduct was simply common law negligence committed at the operational level rather than legislative, executive, judicial or planning level. It is indeed extremely difficult to imagine a situation where directing the driving of an auto-

mobile to a Government installation in the normal performance of duty would involve the exercise of discretion on a planning level.

C.

The third and last point involved in this appeal is whether the release given by Appellant to Fennerty also released the Government, Fennerty's employer, under the provisions of the Tort Claims Act. Should the Court hold with Appellant on this issue, a determination of other issues raised in this appeal is unnecessary.

There is no doubt but that a majority of American Courts hold that a *full general release* of one joint tortfeasor releases another joint tortfeasor, and the District Court and counsel for the Government has taken the position that this rule determines the issue in this case.

However, the rule just stated has no application to the facts of this case. The relationship of master and servant as respects the commission of a tort is not, strictly speaking, that of joint tortfeasor.

McLaughlin vs. Siegel, 185 S.E. 873, 166 Va.

But, notwithstanding such distinction, the release was to Fennerty alone and specifically reserved the right to proceed against any and all other tortfeasors against whom a liability might be predicated by reason of (1) independent negligence of, (2) acts by, or (3) liability on the part of such other

tortfeasor (R 10-11). Certainly the language of the release clearly expresses an intent to release only the one Government employee, and the intention to reserve the right to proceed against the United States and all others is clearly expressed in the release (R 10-11). The Government's liability in this action is twofold, the same being based upon the negligent acts of employee West as well as upon the negligent acts of employee Fennerty.

It is apparent, therefore, that the law applicable to a full general release of a joint tortfeasor has no application to this case, but rather the precise question is whether a limited release of one only of several negligent employees, reserving rights against all who may otherwise be liable to claimant, operates to release the Government employer under the Tort Claims Act.

The applicable rule of law has recently been announced by the Idaho Supreme Court, and is as follows:

“Before one joint tortfeasor can be held to be discharged from liability through the release of another, a consideration for such release must have been accepted by the plaintiff in full satisfaction of the injury.”

Valles vs. Union Pacific Railroad Co., 72 Idaho 231, 239, 238 P. 2d 1154.

The following authorities support this rule:

Ellis vs. Esson, 50 Wis. 138, 6 N.W. 518, 36 Am. Rep. 830;

Chamberlin vs. Murphy, 41 Vt. 110;
Smith vs. Gayle, 58 Ala. 600;
Snow vs. Chandler, 10 N.H. 92, 34 Am. Dec. 140;
Wallner vs. Barry, 207 Calif. 465, 279 P. 148,
at page 151;
Whiting vs. Plumas County, 64 Calif. 65, 28
P. 445.

The Idaho Supreme Court, in the Valles case, in discussing the effect of a release of one of several tort feors upon the liability of other tort feors, states:

“Too many Courts in maundering on this subject have made such a fetish of the pat phrase ‘there can be but one recovery for a tort’ they have lost sight of and ignored the fundamental factor in even handed justice that it is as imperative that the tort claimant receive full compensation as it is that the tort feors shall not pay twice or more than the full a w a r d , determined judicially or otherwise, as a unit or piece meal.”

The Idaho Supreme Court has not directly held that a release of one joint tort feor alone does not release the other. However, they have, in the Valles case, fully discussed the issue and held the above quoted law applicable to independent tort feors and have quoted with approval the rule with respect to joint tort feors. It is apparent from reading the Valles case that the Idaho Supreme Court takes the

position that a plaintiff is entitled to full compensation for his injury, and that a release of one wrongdoer shall not release another where there was no intention to do so and no consideration therefor.

While there are some authorities to the contrary, almost all modern Courts considering the subject will give effect to a release reserving rights against others than the one released.

76 C.J.S. 684-688;

Losito vs. Kruse, 24 N.E. (2d) 705, 126 ALR 1194.

Dean Wigmore says the rule that a release to one of several joint tortfeasors as a discharge of all is merely a "surviving relic of the Cokian period of metaphysics." The real juristic vice of the rule, Mr. Wigmore says, is the claim that mere words of release to A must inexorably signify a release also to B and C. Nothing but false logic prevents a complete repudiation of this principle.

Black vs. Martin, 292 P. 577, 88 Montana 256.

We have been able to find only one case involving the precise question of whether, under the Tort Claims Act, the release of the negligent Government employee, reserving rights against the Government, was effective to preserve the rights against the Government. That case is:

United States vs. First Security Bank of Utah,
(1953, CA 10th Utah) 208 F (2) 424, 42
ALR 2d 951;

and involved a settlement by the injured claimant with the Government employee whose negligence allegedly caused the injury. The claimant executed a covenant not to sue, and the right to proceed against the Government, under the Act, was specifically reserved. The Court held that the cause of action against the United States was not barred under the provisions of 28 USCA 2680 (a) of the Tort Claims Act, even though the Government employee had been released. The Court stated that under the terms of that Section, Congress had, with meticulous care, provided that recovery of the judgment against the Government should constitute a bar to any action against an employee, but for reasons satisfactory to it, had not provided that satisfaction of a claim against an employee should bar the action against the Government; and the Court consequently held the Government not released. Our case does not differ from that case in any material respect. The intention of the parties, as shown by the instrument, in both cases, was to relieve only the employee from liability and no one else.

CONCLUSION

The trial court erred in ruling that the act of Government employee West, in directing Government employee Fennerty to drive a Government vehicle upon the public highways when Fennerty was in an unfit condition to drive due to fatigue and loss of sleep, could not be actionable negligence and the proximate cause of Appellant's injuries. The trial court

further erred in ruling on this point without any evidence upon which to base the ruling.

The trial court erred in ruling that the court had no jurisdiction of the action based upon the alleged negligence of Government employee West because his negligent acts were in the performance of a discretionary function or duty as set out in 28 USCA 2680 (a). The trial court further erred in ruling on this point without evidence to support the ruling.

The trial court erred in ruling that the release of Government employee Fennerty, by claimant, released also the Government, when the release shows on its face that it was intended only to release the employee and not the Government and others and where there was no consideration for a complete release.

The trial court erred in granting Summary Judgment against claimant and in favor of the Government.

Respectfully submitted,

FREDRICKS & ROBERTS,

A. T. FREDRICKS,

Boise, Idaho,

THERON E. ROBERTS,

Boise, Idaho,

Attorneys for Appellant.

IN THE
United States Court of Appeals
For the Ninth Circuit

CHARLES J. FRIDAY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From the United States District Court for the
District of Idaho, Southern Division

BRIEF FOR THE APPELLEE

FILED

AUG 11 1956

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 15114

CHARLES J. FRIDAY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From the United States District Court for the
District of Idaho, Southern Division

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The jurisdiction of the district court was invoked under 28 U.S.C. 1346(b). The memorandum opinion and judgment of the district court (R. 15-18) are not reported. The jurisdiction of this Court rests upon 28 U.S.C. 1291 by reason of a notice of appeal filed March 19, 1956, from a judgment in favor of the United States entered on January 20, 1956 (R. 18).

STATEMENT

This action was brought against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), by Charles J. Friday, appellant here, to recover for injuries suffered in a three-car collision. The accident was alleged to have been caused by the negligent operation of a Government vehicle by an employee of the United States. The District Court for the District of Idaho, Southern Division, pursuant to a memorandum opinion (R. 15-17), entered summary judgment for the Government (R. 17-18). The facts, as alleged in the complaint and the proceedings below, may be summarized as follows:

The complaint, filed October 12, 1954 (R. 3-6), states that at approximately 8:00 A.M. on October 30, 1953, appellant was driving his 1951 Kaiser automobile, in a lawful manner, west on U.S. Highway 30 about three and one-half miles west of Boise, Idaho (R. 3). At the same time, one Ralph Lacy was driving a Willys Jeep in an easterly direction on that highway (R. 3). The complaint continues that at that time and place, one Francis E. Fennerty, proceeding behind Lacy's jeep in a Chevrolet panel truck, had negligently fallen asleep at the wheel, and as a consequence his truck was driven into the rear of the vehicle operated by Lacy. Lacy's car, in turn, was propelled across the center line of the highway, causing it to collide with the Friday automobile (R. 3-4, 6). The vehicle being operated by Fennerty was stated to be owned by the United States, and it was alleged that Fennerty was a Government employee, acting at the time within the scope of his employment (R. 4).

Plaintiff went on to state “that the United States, acting by and through its agents and servants, and in particular its agent and servant, S. W. Wells,¹ was negligent, reckless and careless in directing the said Francis E. Fennerty to drive said Government vehicle to a certain Government soil and water testing project near Caldwell, Idaho, the evening of October 29, 1953, and was negligent, reckless and careless in authorizing and directing [Fennerty] to remain on said project and continuously work throughout the night of October 29, 1953, and to thereafter drive said Government vehicle from that point and return to Boise, Idaho, which he was doing at the time of the above-described collision without allowing [Fennerty] to obtain sufficient sleep or rest before his return to Boise, Idaho, and that the fatigued condition of [Fennerty] was a contributing factor to the negligent and careless operation of said United States vehicle prior to and at the time of the collision with the automobile of Plaintiff” (R. 4-5). Wells (West) was stated to be the immediate supervisor of Fennerty in the United States Geological Survey, Ground Water Branch (R. 6). The complaint concluded by alleging consequent property and personal injuries and requested judgment in the amount of \$61,386.85 (R. 6).

The Government thereafter answered, denying that the accident was caused by any negligence on the part of Fennerty or his supervisor, and stating that if the supervisor performed the acts alleged, it was in the performance of a discretionary function and without the purview of the Tort Claims Act (R. 7-8). The

¹ Properly, S. W. West (R. 16).

answer also stated that on December 7, 1953, plaintiff, for a consideration of \$5,000, delivered to Fennerty a general written release, which release also effected a discharge of the Government from the liability asserted in the complaint (R. 9-10). A copy of the release (R. 10-12) was attached to the complaint as an exhibit.² Subsequently, in answer to the Govern-

² The release (R. 10-12) provided as follows:

RELEASE IN FULL

For and in consideration of the sum of Five Thousand (\$5,000.00) and other valuable considerations, the receipt of which is hereby acknowledged, the undersigned do hereby release and forever discharge Francis E. Fennerty and Phyllis C. Fennerty, jointly and severally, from any and all claims, demands, damages, expenses, costs, causes of actions and suits growing out of and arising by reason of that certain accident which occurred on or about October 30, 1953, on U.S. Highway 30, at or near 2½ miles west of Boise, Ada County, Idaho, inflicting upon the undersigned serious personal injuries and property damages.

It is understood and agreed that this is a full and final release of all liability of whatever character, kind or nature, growing out of the above captioned accident by reason of personal injuries and property damages sustained by the undersigned as against the said Francis E. Fennerty and Phyllis C. Fennerty.

It is further understood and agreed that payment hereunder is not and shall not be construed as admission of liability by the said Francis E. Fennerty and Phyllis C. Fennerty and that this is a full, complete and final compromise settlement of disputed claims as between the parties hereto.

It is further understood and agreed that this release, as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tort feisor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feisor or tort feisors causing or contributing to the damages and injuries suffered by the undersigned.

Dated this 7th day of December, 1953, at Seattle, State of Washington.

CHARLES J. FRIDAY
DOROTHY W. FRIDAY

ment's Request for Admissions (R. 12-13), plaintiff admitted that the release produced by the Government was a correct copy of the December 7, 1953, release; that it was for valuable consideration; and that it related to the accident in suit (R. 13).

Thereafter, on May 13, 1955, the Government moved for summary judgment on the basis of the admissions and pleadings (R. 14-15). On January 10, 1956, the district court entered summary judgment for the Government (R. 17). The court stated that under the undisputed facts, the alleged actions of the supervisor, West, were "certainly not a proximate cause of the accident," and in any event, his decision being discretionary, would come within the classification of suits prohibited by the Tort Claims Act (R. 16). The court went on to discuss the effect of the release. It concluded that the release excepted from its terms independent tortfeasors, that the United States, with respect to its employee Fennerty, was, in law, not an independent, but a joint tortfeasor and that, therefore, the release discharged the United States as well (R. 16).

QUESTIONS PRESENTED

1. Whether the effect of the release executed by appellant was to discharge the United States from liability for the alleged negligence of its employee Fennerty.
2. Whether the release executed by appellant effected the discharge from liability of Government employee West.
3. Whether the complaint stated has alleged such negligent or wrongful acts on the part of West as

would constitute a valid cause of action against the Government.

SUMMARY OF ARGUMENT

Appellant seeks to bottom Governmental liability upon dual bases: the alleged negligent acts of Fennerty in his operation of the Government vehicle; and the purported negligence of Fennerty's supervisor, West, in making a night assignment and in conjunction therewith, either authorizing or directing subsequent automotive travel. In both instances, the district court held liability was non-existent as a matter of law. The result, we submit, is a correct one.

With respect to Fennerty, the release executed by appellant constituted a release of the United States as well. Generally, a release of one joint tortfeasor has the effect in law of releasing remaining joint tortfeasors—a category in which the United States, at the most, was placed by virtue of its employment relationship with Fennerty. Although there is a division in the cases as to whether a release given one joint tortfeasor may, by a reservation, save a claimant's rights against other joint tortfeasors, examination of the release in controversy clearly shows that, even according validity to such a reservation, any right of action against the United States was not, in terms, reserved. The reservation contained in that release specifically applies only to a tortfeasor against whom liability may be predicated by reason of “independent negligence * * * acts by, or liability * * * causing or contributing to the damages and injuries suffered” (R. 11). The *respondeat superior*

liability of the United States is manifestly not encompassed within those terms.

Nor does the asserted *respondeat superior* liability of the Government, for the alleged acts of West, rest upon stronger foundations. West's status being that of a joint tortfeasor, the release of another joint tortfeasor would ordinarily release him and his employer as well. Even accepting the approach of those cases which recognize the validity of reservations in a release, the district court's construction of this reservation as applying solely to independent tortfeasors would preclude applicability of the reservation to West. Moreover, apart from the foregoing, the complaint, as to West, fails on other grounds. The allegations of the complaint examined in the context of the controlling cases disclose an absence of the fundamental factors upon which a valid cause of action for negligence must be founded. Both with regard to duty and causation, the complaint, as to West, is essentially defective. The basis, therefore, for the vicarious liability of the Government is absent. The district court mentioned the discretionary function exception of the Tort Claims Act as an alternative basis for precluding liability with respect to West. However, in view of the fundamental bars to recovery outlined above, we see no valid reason for raising the complex issues inhering in that defense.

ARGUMENT

I

The District Court Properly Held That Appellant's Release of Government Employee Fennerty Was an Effective Release of the United States From Liability to Appellant for Fennerty's Alleged Negligence

Appellant's initial claim against the United States arising out of the collision is based upon the purported negligence of Fennerty in his operation of the Government vehicle. Fennerty, it is conceded, was released from liability for valuable consideration. Nevertheless, appellant insists, he is entitled to additional compensation for the same injuries by virtue of the *respondeat superior* liability of Fennerty's employer. It is clear, however, that this release did not merely affect the personal liability of Fennerty, but undercut, as well, the liability of the United States.

At common law, the rule was generally established that release by a claimant of one of several joint tortfeasors constituted an absolute bar to an action against the others.³ Such a release, many of the cases further held, could not be qualified by a reservation of rights against the remaining tortfeasors—a reservation being considered ineffective and void and the remaining joint tortfeasors discharged notwithstanding.⁴ See

³ Under Idaho law, the joint tortfeasor relationship is present where there is a "concert of action, common design or duty, joint enterprise, or other relationship." *Husky Ref. Co. v. Barnes*, 119 F. 2d 715, 716 (C.A. 9); *Young v. Anderson*, 33 Ida. 522, 196 P. 193.

⁴ It is the theory of at least some of these courts that in the case of an unliquidated demand, it could not be said that the payment of any sum, however small, in consideration of a release, does not, or cannot, operate as compensation for the injuries. See *Flynn v. Manson*, 19 Cal. App. 400, 126 P. 181; *Gilbert v. Timms*, 7 Ohio C.C. (NS) 253.

e.g., *Aiken v. Insull*, 122 F.2d 746 (C.A. 7), certiorari denied, 315 U.S. 806; *Goldstein v. Gilbert*, 125 W.Va. 250, 23 S.E. 2d 606; *Roper v. Florida Pub. Utilities Co.*, 131 Fla. 709, 179 So. 904; *Bland v. Warwickshire Corp.*, 160 Va. 131, 168 S.E. 443; *Ducey v. Patterson*, 37 Colo. 216, 86 P. 109; *Williams v. LeBar*, 141 Pa. 149, 21 Atl. 525; *Stusser v. Mutual Union Ins. Co.*, 127 Wash. 449, 453, 221 P. 331; *Moffit v. Endtz*, 232 Mich. 2, 204 N.W. 764; *Farmers Sav. Bank v. Aldrich*, 153 Iowa 144, 133 N.W. 383.

Certain jurisdictions have departed from the common law rule by recognizing the validity of such reservations and their effect on the liability of persons who come within their terms. This view is exemplified by the position taken by the *Restatement, Torts*, which provides as follows:

§ 885. (1) A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document.

The Idaho Supreme Court has not had occasion to pass upon this question or to align itself with one line of decisions or the other. The Idaho court, in common with other courts, has taken the position that the release of one independent tortfeasor does not have

the effect of releasing other independent tortfeasors.⁵ *Valles v. Union Pac. R. Co.*, 72 Ida. 231, 238 P.2d 1154. See also, *Husky Ref. Co. v. Barnes*, 119 F.2d 715 (C.A. 9). However, while expressly holding the foregoing in *Valles* as to independent tortfeasors, the Idaho court has just as explicitly declined to commit itself with respect to joint tortfeasors. 72 Ida. 231 at 239.⁶

Irrespective, however, of the silence of the Idaho Supreme Court, it is apparent, in the circumstances of this case, that the same result is reached whether the rule applied is that adhered to at common law or that exemplified by the *Restatement, supra*. Even following the approach which gives effect to reservations, the terms of the reservation in this case clearly do not encompass the United States. The release itself, after stating that "this is a full and final release

⁵ An independent tortfeasor status is created where the independent, tortious acts of two or more persons combine to produce an injury. *Husky Ref. Co. v. Barnes*, 119 F. 2d 715, 716 (C.A. 9); *Valles v. Union Pac. R. Co.*, 72 Ida. 231.

⁶ Appellant, in its brief (p. 20), cites an extract from the *Valles* opinion which states (72 Ida. at 239):

"Before one joint tort feasor can be held to be discharged from liability through the release of another, a consideration for such release must have been accepted by the plaintiff in full satisfaction of the injury." * * * *Wallner v. Barry*, 207 Cal. 465, 279 P. 148, 151.

The foregoing, as the *Valles* opinion makes clear, is an extract from a decision of the California Supreme Court in *Wallner v. Barry*. The *Valles* opinion immediately appends after this extract the following comment (72 Ida. 231 at 239):

It is necessary that we hold the above law pertinent only as to independent tort-feasors. We hold neither way herein as to joint tort-feasors.

of all liability of whatever character, kind or nature, growing out of the above captioned accident'' against Fennerty (R. 11), goes on to provide (at R. 11):

* * * but this release shall not inure to the benefit of any other tort feisor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feisor or tort feisors causing or contributing to the damages and injuries suffered by the undersigned.

The district court held this to be a reservation as against independent tortfeasors and stated that as to its employee, Fennerty, the Government was not an independent but a joint tortfeasor.⁷ But aside from the foregoing, the plain terms of the reservation do not cover the United States. With respect to Fennerty's negligence, the Government is not being charged with any "independent negligence, acts by, or liability * * * causing or contributing to the damages and injuries suffered" by Friday (R. 11).

⁷ This accords with the now generally-established view that where liability on the part of a master is predicated solely on his *respondeat superior* liability for the negligent acts of his servant, and not on any negligent acts of the master himself, the master and servant are treated as joint tortfeasors. See *United States v. First Security Bank of Utah*, 208 F. 2d 424, 428 (C.A. 10); *Norwalk v. Air-way Electric Appliance Corp.*, 87 F. 2d 317 (C.A. 2); *Johns v. Hake*, 15 Wash. 2d 651, 656, 131 P. 2d 933; *Lasko v. Meier*, 394 Ill. 71, 76, 67 N.E. 2d 162; 98 A.L.R. 1057. A valid release of either master or servant from liability for the tort operates to release the other. See *e.g.*, *Horgan v. Boston Elevated R. Co.*, 208 Mass. 287, 94 N.E. 386; *MacDonald v. Hornblower & Weeks*, 268 Mich. 626, 256 N.W. 572; *Hartigan v. Dickson*, 81 Minn. 284, 83 N.W. 1091; *McLaughlin v. Siegel*, 166 Va. 374, 185 S.E. 873.

The Government's liability is predicated solely on a *respondeat superior* basis for the alleged negligence of one of its employees.

If it were the intent of the reservation to preserve any claim which appellant might have had against the United States, the language used was not apposite. It is illuminating in this connection to compare the reservation in the present case with the reservation involved in *United States v. First Security Bank of Utah*, 208 F.2d 424 (C.A. 10), which case, appellant asserts (Brief, p. 23), does not differ from this case "in any material respect." *First Security* involved four Tort Claims Act suits brought against the United States after the plaintiffs had made settlements with the Government employee allegedly responsible for their injuries. In conjunction with these settlements, each plaintiff executed a covenant not to sue "wherein the right to proceed against the United States under the Tort Claims Act was specifically reserved." 208 F.2d at 428. The issue in *First Security*, insofar as it relates to the case at bar, was whether plaintiffs had saved their rights against the Government. The Tenth Circuit pointed out that when a master is sought to be held liable for the negligence of his servant on a *respondeat superior* basis, a majority of the courts consider them to be joint tortfeasors. 208 F.2d at 428. With respect to the liability of the United States, the court first stated that "It is well established that the release of one joint tortfeasor operates to release all of them" (208 F.2d at 428). It went on to hold, however, that under Utah law, which controlled, a covenant not to sue one or more tortfeasors with an

express reservation of the right to proceed against others does not bar an action against the other tortfeasors. 208 F.2d at 428.

It is apparent that the *First Security* decision is distinguishable from the present case on two fundamental grounds. Initially, as the Tenth Circuit pointed out, Utah has a statute which alters the common law with respect to the release of joint tortfeasors. There is no comparable statute in Idaho. Moreover, the terms of the reservation in the release involved in *First Security* differed markedly from the terms before this Court in the present case. In the former, the right to proceed against the United States to recover damages under the Tort Claims Act was "specifically reserved" whereas in the instant case, the reservation was couched in language (*supra*, p. 11) as could have no applicability to the *respondeat superior* liability of the United States. In fact, it would seem the most likely construction that the intent of the reservation in the present case was to save appellant's rights against any independent tortfeasor, such as Ralph Lacy, whose jeep it was that actually collided with appellant's car (R. 3-4).⁸ Clearly, the analogies derived from a comparison with *First Security* favor the position of the Government, not that of appellant.

In short, viewed even from the legal vantage point most favorable to appellant, the reservation in this release did not reserve any right appellant might have

⁸ The *Restatement* has taken the position that where each independent tortfeasor is liable for the entire harm, a release of one independent tortfeasor, without reservation, releases the remaining independent tortfeasors. *Restatement, Torts*, Section 885.

had against the Government arising out of the alleged negligence of its employee, Fennerty. Accordingly, the release of Fennerty precluded Governmental liability for his acts as well.

II

Plaintiff's Complaint Failed to State a Valid Cause of Action Against Government Employee West

Notwithstanding its release for consideration of Government employee Fennerty, appellant seeks to impose liability on the United States arising out of the same accident for the actions of Fennerty's supervisor, S. W. West. The complaint alleges that West was negligent in making a night duty assignment to Fennerty, to be performed near Caldwell, Idaho, about twenty-five miles from Boise, and "authorizing and directing [Fennerty] to remain on said project and continuously work throughout the night of October 23, 1953, and to thereafter drive said Government vehicle from that point and return to Boise, Idaho, which he was doing at the time of the above-described collision without allowing [Fennerty] to obtain sufficient sleep or rest before his return" (R. 4-5). Fennerty's fatigued condition was asserted to be a contributing factor to the allegedly negligent operation of the Government vehicle at the time of the collision (R. 5).

Initially, it is clear that if the common law theory as to the effect of a release is followed (*supra*, pp. 8-9), one of the consequences of appellant's release of Fennerty was the release from liability of West. Moreover, even following the view espoused by the *Restatement* (*supra*, p. 9), which gives effect to a

reservation in such a release, the reservation, which, as construed by the district court, applies only to independent tortfeasors, does not cover West, who would manifestly be a joint tortfeasor. Again, it should be emphasized that the reservation appears to be an effort to preserve appellant's rights against an independent tortfeasor such as Lacy, whose vehicle actually collided with appellant's car.

However, even disregarding the foregoing, appellant's attempt to predicate Governmental liability upon the alleged liability of its employee, West, is fundamentally defective. Appellant, to recover from the United States upon a *respondeat superior* basis for the allegedly negligent acts of West, must, of course, state the elements of a valid cause of action against West under the law of the State of Idaho. 28 U.S.C. 1346(b). Idaho law, in turn, predicates tort liability for negligence upon the standard principles generally applicable—breach of a duty to use due care plus causation. *Chatterton v. Pocatello Post*, 70 Ida. 480, 483, 223 P.2d 389. Accepting the factual allegations of the complaint as true, the essential elements of a sustainable cause of action are not set forth.

The primary breach of duty factor is assuredly not present here, as a matter of law. The gist of appellant's grievance with respect to the actions of West is that West assigned Fennerty to perform certain night work at a Government soil and water testing project near Caldwell, Idaho, and authorized and directed him to remain on the project throughout the night and thereafter return to Boise, Idaho, with-

out sufficient rest (R. 4-5). The complaint, it will be noted, contains no allegation that Fennerty had been on duty during the day prior to this night work. Nor is there any allegation that his supervisor knew that Fennerty's condition was such that he was, or would be, unfit to drive the twenty-five miles between Caldwell and Boise. The complaint is even devoid of any allegation that Fennerty was required to return by a certain time. The fundamental question arises then, as to what duty, if any, West owed the general public, or one in appellant's position, in these circumstances.

These factors are pointed up by examination of a recent decision of this Court. *General Electric Co. v. Rees, et al.*, 217 F.2d 595 (C.A. 9), involved an action for personal injuries and property damages sustained when a bus owned by defendant company collided with plaintiff's dwelling after the bus driver had suffered a fatal heart attack. The complaint in that case alleged that the driver had previously been examined and treated by company physicians; that the company knew, or should have known, that the driver was in poor health, suffering from a heart condition and hardening of the arteries and was subject to heart attacks; and that, therefore, the company knew, or should have known, that the driver's continued employment in that capacity would be dangerous to the public at large and might result in injuries to persons and property. The district court overruled a motion to dismiss the complaint and the case proceeded to a trial, followed by a jury verdict for the plaintiffs. On appeal, this Court reversed, stating, *inter alia*, that the count of the complaint outlined above "did not

state a cause of action or a claim upon which relief could be granted.” 217 F.2d 595, 597. With respect to the duty allegedly incumbent upon the company, the opinion states (217 F.2d at 597):

Defendant owes no such duty to members of the general public. It is conceivable that an industrial concern might owe a duty to the employee to have a doctor examine him in order that he might not be placed in an extra-hazardous situation on account of disabilities not obvious to an ordinary observer or of which it obtained knowledge in fact. More remotely, fellow employees might rely upon the performance of this obligation. But the driving of the vehicle described certainly would not fall into a classification of extra-hazardous employment either for [the driver] or for the fellow employees who rode as passengers. A motor vehicle is not a dangerous instrumentality.

The Court recognized that “[o]bvious physical defects can be contemplated which might place a duty on the employer even here,” but went on to state that if such a cause of action were “otherwise valid, the employer must still have had actual knowledge.” 217 F.2d at 598. Relating the foregoing to the case before it, this Court concluded “that it was improper for the court to impose upon defendant toward the public any duty unless defendant positively knew, through its physician or otherwise, that [the driver] might die at any moment and that risk and danger to the public were involved.” 217 F.2d at 598.

The reasoning underlying *Rees* finds support in analogous cases in this area. The closest parallel in the

cases to the circumstances of the instant action, with respect to the liability of West, are those decisions dealing with the liability of the owner of a car for the negligence of a third person to whom the car is loaned or hired when that third party suffers from some disability which causes an accident. The basis for liability in such cases is the owner's negligence in entrusting the vehicle to an incompetent person.⁹ Although the Idaho courts have not had occasion to pass upon the question of liability predicated on this ground, other jurisdictions which have, have uniformly restricted the owner's liability to cases where the owner "intrusts his automobile to another knowing that the borrower is an incompetent, reckless or careless driver and likely to cause injuries to others in the use of the automobile." *Department of Water and Power v. Anderson*, 95 F.2d 577, 582 (C.A. 9), certiorari denied, 305 U.S. 607; cf. *R. J. Reynolds Tobacco Co. v. Newby*, 145 F.2d 768 (C.A. 9). See cases collected 36 A.L.R. 1137, 1148-1150; 68 A.L.R. 1008, 1009-1014; 100 A.L.R. 920, 923-926. The factors generating such liability have been confined by those cases to certain generalized categories: where the owner had knowledge of some specific physical or mental impairment of the driver; known repeated instances of the driver's prior negligent or reckless conduct; or, intoxication or known addiction to

⁹ This situation should be differentiated from those cases where the owner's liability is predicated either on a *respondeat superior* basis, or on the basis of a statute which makes him liable for the driver's negligence. With respect to the alleged liability of West, neither of those bases are presented by the instant case.

excessive use of intoxicants. We have been unable to discover any case where the owner's liability has been predicated solely on the possibility that an otherwise competent driver may, at some subsequent time, become fatigued and fall asleep at the wheel.¹⁰ Nor, as indicated *supra*, p. 16, does the complaint in the present case contain allegations necessary to bring it within the ambit of the above doctrine. Cf. *Spurling v. Fillington*, 244 Ala. 172, 12 So. 2d 740, 742; *Graham v. Cleveland*, 58 Ga. App. 810, 815-816, 200 S.E. 184; *Davis v. Shaw* (La. App.), 142 So. 301, 306-307. The factors underlying duty here, therefore, as in the *Rees* case, are absent.

Appellant fares no better upon consideration of the causation element. The Idaho cases establish that "proximate causes are such as are the ordinary and natural result of the omission or negligence complained of, and are usual and might have been reasonably expected to occur." *Antler v. Cox*, 27 Ida. 517, 527, 149 P. 731; *Craig v. Village of Meridian*, 56 Ida. 220, 228, 52 P.2d 145. The complaint in the

¹⁰ *Curtis v. Curtis*, 58 Ida. 76, 70 P. 2d 369, cited by appellant in this connection, is not in point. *Curtis* was a suit by a passenger in an automobile against the driver for injuries received when the driver fell asleep at the wheel and the car crashed off the road. At the time of the accident, both the driver and the passenger had apparently fallen asleep. The Idaho court held that the driver could have been found to have been negligent for falling asleep, but that if the plaintiff passenger had seen that the driver was asleep or, by the exercise of ordinary care for her own safety she would have seen that the driver was asleep, it was plaintiff's duty to arouse the driver, and failure to do so would be contributory negligence barring recovery. The alleged negligence of West in the present case bears no analogy to the negligence attributable to either of the parties in *Curtis*.

present case alleges merely that West directed Fennerty to drive to a Government project near Caldwell, "authorizing and directing" him to remain and work throughout the night, and to thereafter return to Boise. Accepting those allegations as true, it would hardly appear that West's assignment of Fennerty qualified under Idaho law as the proximate cause of the collision which ensued. The complaint on its face, and accepting its factual assertions as true, generates the conclusion that the sole proximate cause, in law, of the accident was the alleged negligence of Fennerty at the wheel. That Fennerty's work assignment placed him in a position where use of a car was necessary, is too remote a causative factor upon which to base liability of his supervisor, West. In the absence of knowledge of any countervailing facts, a supervisor is entitled to assume that his subordinates are possessed of a minimum degree of competence and judgment. Cf. *Haverland v. Potlatch Lumber Co.*, 34 Ida. 237, 200 P. 129; *R. J. Reynolds Tobacco Co. v. Newby*, 145 F.2d 768, 771 (C.A. 9).

Fundamental defects, therefore, underlay appellant's claim against the United States based upon the alleged acts of Government employee West. Recovery was accordingly properly denied by the district court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court be affirmed.

GEORGE COCHRAN DOUB,
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United States Attorney,

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AUGUST 1956

No. 15120

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the
Estate of SAM J. WILSON, Deceased, and
JESSIE WILSON,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

AUG -9 1956

DAVID D. O'BRIEN, CLERK

No. 15120

United States
Court of Appeals
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UNITED STATES OF AMERICA,

Appellant,

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THE UNITED STATES NATIONAL BANK OF
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Appeal from the United States District Court for the
District of Oregon

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The United States District Court
for the District of Oregon

Civil No. 8011

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the
Estate of Sam J. Wilson, Deceased, and JESSIE
WILSON,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

1. This is an action for the recovery of individual income taxes for the year 1949 erroneously and illegally assessed against plaintiffs and collected by the District Director of Internal Revenue for the District of Oregon from plaintiff The United States National Bank of Portland (Oregon), as executor of the Estate of Sam J. Wilson, deceased. Jurisdiction of this action is based upon Section 1346(a)(1) of Title 28 of the United States Code, as amended.

2. During the year 1949 Samuel J. Wilson, also known as Sam J. Wilson, and plaintiff Jessie Wilson were husband and wife, residing in Washington County, Oregon. Sam J. Wilson died on October 7, 1950. On the 13th day of October, 1950, The United States National Bank of Portland (Oregon) was duly appointed by the County Court of Wash-

ington County, Oregon, as the sole executor of his estate, and it is still acting in that capacity. During the period from September 1, 1947, until October 30, 1952, Hugh H. Earle was the Collector of Internal Revenue for the District of Oregon and, since October 31, 1952, R. C. Granquist has been and now is the District Director of Internal Revenue for the District of Oregon.

3. During the months of April or May, 1943, Sam J. Wilson (hereinafter called "Wilson") entered into an oral agreement of joint venture with one Samuel A. Agnew (hereinafter called "Agnew") by the terms of which they mutually agreed that Wilson would search for and examine various timberlands, locate the same and determine their suitability for purchase for later resale at a profit. It was mutually agreed that Agnew would furnish the necessary funds for the purchase of such timberlands as were selected by Wilson. It was further understood and agreed between them that all of said timberlands were to be sold within a reasonable time and that any profit resulting therefrom on timberlands acquired from any state, county or political subdivision of any state at a tax sale were to be divided equally between Wilson and Agnew and that profits derived from the sale of timberlands acquired from private owners were to be divided on the basis of 80% thereof to Agnew and 20% to Wilson.

4. Thereafter, Wilson, pursuant to the terms of said agreement of joint venture, located certain

desirable timberlands which were thereafter purchased by him in the name of Agnew with funds supplied by Agnew.

5. On or about the 15th day of September, 1947, Agnew refused to recognize that Wilson had any right, title, interest or claim to such timberlands and attempted to repudiate the joint venture agreement hereinbefore described. Thereafter, and on or about the 23rd day of July, 1948, Wilson instituted a suit in the Superior Court of the State of California for the County of Del Norte, praying that the joint venture of Agnew and himself be established and that Wilson's interest in the timberlands be determined. The question was put at issue by appropriate pleadings of Agnew and Wilson, and on the 10th day of November, 1949, the case came on for trial before said court. After the trial had started, the controversy between Wilson and Agnew was fully compromised and settled under an agreement by which Agnew agreed to convey to Wilson certain tracts of the timberlands which had been so acquired. Wilson was also permitted to retain \$25,000.00 in cash which had been advanced previously by Agnew but not invested by Wilson in properties of the joint venture. Thereafter, Agnew, by appropriate conveyances, conveyed the legal title to said timberlands to Wilson.

6. Samuel J. Wilson and Jessie Wilson duly filed their joint income tax return for the year 1949 with the Collector of Internal Revenue for the District of Oregon.

7. Under date of July 14, 1954, the District Director of Internal Revenue for the District of Oregon notified plaintiffs of a deficiency asserted against Sam J. Wilson and Jessie Wilson for the year 1949 in the amount of \$361,852.06 and an over-assessment for the year 1950 in the amount of \$16,789.84. The principal basis of these adjustments was the wrongful assertion that 70% of the value of the timberlands conveyed to Wilson by Agnew (the remaining 30% being received by the attorneys for Wilson in said proceedings) was not a nontaxable dissolution of a joint venture, but constituted the receipt by Wilson of compensation in the amount of \$502,176.85, plus the \$25,000.00 received by Wilson in cash, for the performance of personal services.

In the said notice of deficiency dated July 14, 1954, the Commissioner of Internal Revenue also erroneously valued the timberlands in Humboldt County, California, at \$6.50 per M rather than \$2.50 per M, and erroneously valued the timberlands in Curry County, Oregon, at \$8.00 per M rather than \$4.00 per M.

In the said notice of deficiency the Commissioner also erroneously failed to find that the personal services performed by Sam J. Wilson covered a period of thirty-six calendar months, or more, and that the maximum income tax on the alleged compensation received therefor was governed by the provisions of Section 107(a) of the 1939 Internal Revenue Code.

8. On August 27, 1954, plaintiff The United States National Bank of Portland (Oregon), executor of the Estate of Sam J. Wilson, Deceased, paid to the District Director of Internal Revenue for the District of Oregon the sum of \$437,783.53, representing the deficiency of \$361,852.06 plus interest thereon in the amount of \$96,188.20, less the over-assessment for the year 1950 in the amount of \$16,789.84 and interest thereon in the amount of \$3,466.89. Thereafter, and on or about September 8, 1954, plaintiffs duly filed with the District Director of Internal Revenue their claim for refund in the amount of \$437,783.53, upon the grounds that the timberlands received by Wilson in the dissolution of said joint venture did not constitute compensation for his services; that the values attributed to the timberlands by the Commissioner of Internal Revenue were excessive; and that the Commissioner erred in failing to apply the provisions of Section 107(a) of the 1939 Internal Revenue Code.

9. Under date of January 5, 1955, plaintiffs received a statutory notice of the disallowance of said refund claim, in accordance with the provisions of Section 6532(a)(1) of the Internal Revenue Code of 1954.

10. The conveyance to Sam J. Wilson in 1949 of the legal title to the said timberlands constituted the nontaxable dissolution of a joint venture, rather than compensation for his personal services.

In the alternative, plaintiffs allege that the fair market value of the Humboldt County timber did

not exceed \$2.50 per M and the value of the Curry County Timber did not exceed \$4.00 per M.

In the further alternative, plaintiffs allege that the personal services performed by Sam J. Wilson covered a period of thirty-six calendar months, or more, and that the maximum income tax on the alleged compensation received therefor was governed by the provisions of Section 107(a) of the 1939 Internal Revenue Code.

Wherefore, plaintiffs pray for judgment against defendant as follows:

1. For the sum of \$437,783.53, together with interest thereon from August 27, 1954, and for their allowable costs and disbursements incurred therein;

2. If the Court should, for any reason, determine that 70% of the fair market value of said timberlands constituted compensation to Wilson for his personal services, then plaintiffs pray for judgment against defendant for the sum of \$271,376.45, together with interest thereon from August 27, 1954, and for their allowable costs and disbursements incurred therein; and

3. If the Court should, for any reason, determine that 70% of the fair market value of said timberlands constituted compensation to Wilson for his personal services, but that such services were performed over a period of thirty-six months or more, then, in the further alternative, plaintiffs pray for judgment against defendant for the sum of \$317,501.89, together with interest thereon from

August 27, 1954, and for their allowable costs and disbursements incurred therein.

/s/ C. E. WHEELOCK, C.P.D.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,
Attorneys for Plaintiffs.

[Endorsed]: Filed March 28, 1955.

[Title of District Court and Cause.]

ANSWER

I.

The allegations of paragraph number 1 of the complaint are admitted, except that it is denied that any tax was erroneously or illegally assessed against or collected from plaintiffs.

II.

The allegations of paragraph number 2 of the complaint are admitted.

III.

The allegations of paragraph number 3 of the complaint are denied.

IV.

The allegations of paragraph number 4 of the complaint are denied, except that it is admitted that Wilson located certain desirable timberlands which

Agnew thereafter purchased in his own name with his own funds.

V.

The allegations of paragraph number 5 of the complaint are denied, except that it is admitted that Wilson and Agnew filed suits in the Superior Court of the State of California for the County of Del Norte, seeking a determination of controversy which had arisen between them in connection with the discovery and purchase of said timberlands; and that it is further admitted that said controversy was compromised and settled on or about November 14, 1949, under an agreement by which Agnew agreed to convey to Wilson certain tracts of the timberlands which had been so acquired and that Wilson was also permitted to retain \$25,000 in cash which had been advanced previously by Agnew but not invested by Wilson in properties as intended at the time of the advancement. It is further admitted that thereafter Agnew, by appropriate conveyances, conveyed the legal title to said timberlands to Wilson.

VI.

The allegations of paragraph number 6 of the complaint are admitted, except that it is denied that said joint income tax return reported the true net income of Samuel J. Wilson and Jessie Wilson for the year 1949, or the correct amount of tax due thereon.

VII.

The allegations of the first subparagraph of paragraph number 7 of the complaint are denied, except

that it is admitted that under date of July 14, 1954, the Commissioner of Internal Revenue notified plaintiffs of a deficiency in income tax for the year 1949, asserted against Samuel J. Wilson and Jessie Wilson in the amount of \$361,852.06, and an overassessment for the year 1950 in the amount of \$16,789.84; and that it is further admitted that one basis for said adjustments was the determination by the Commissioner of Internal Revenue that part of the value of timberlands conveyed to Wilson by Agnew and the cash received by Wilson from Agnew constituted ordinary income to Wilson in the amounts of \$502,176.85 and \$25,000, respectively, for the year 1949.

VIII.

The allegations of the second subparagraph of paragraph number 7 of the complaint are denied, except that it is admitted that the Commissioner of Internal Revenue, in said notice of deficiency, valued timber in Humboldt County, California, at \$6.50 per M and the timber in Curry County, Oregon, at \$8.00 per M.

IX.

The allegations of the third subparagraph of paragraph number 7 of the complaint are denied, except that it is admitted that the Commissioner of Internal Revenue determined that the personal services performed by Samuel J. Wilson did not cover a period of thirty-six calendar months.

X.

The allegations of paragraph number 8 of the complaint are admitted, except that the allegations

and grounds stated in said claim for refund are denied.

XI.

The allegations of paragraph number 9 of the complaint are admitted.

XII.

The allegations of paragraph number 10 of the complaint and of each subparagraph thereof are denied.

Wherefore, defendant demands judgment that the complaint of the plaintiffs be denied and that it be awarded its costs herein.

C. E. LUCKEY,

United States Attorney,

Attorney for Defendant;

/s/ EDWARD J. GEORGEFF,

Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause having come on for a pretrial conference before the Honorable Chief Judge McColloch, at Portland, Oregon, on the 17th day of October, 1955, Plaintiffs appearing by C. E. Wheelock, Carl E. Davidson, and Charles P. Duffy, their attor-

neys, and Defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, Edward J. Georgeff, Assistant United States Attorney, and Allen A. Bowden and Walter B. Langley, Attorneys, Department of Justice.

It appears from the pleadings and pretrial proceedings that the parties, by their respective counsel, hereby stipulate that the following statements of fact may be taken as true and shall be received in evidence in this cause, subject to the right of any party to enter objections upon the grounds of immateriality and/or irrelevancy and subject to the further right of any party to introduce other and further evidence not inconsistent herewith. Exhibits which are incorporated herein and individually marked for identification as Plaintiffs' Exhibits 1-12 and Defendant's Exhibits A-R shall be received in evidence in this cause subject to the right of either party to enter objections thereto and the statements contained therein upon the grounds of immateriality and/or irrelevancy, and subject to the further right of any party to introduce other and further evidence not inconsistent herewith. The parties have waived all objections as to the authenticity of such exhibits and have agreed that copies of any exhibit may be introduced in lieu of the original thereof.

Statements of Fact

I.

This is an action for the recovery of individual income taxes for the year 1949 assessed against

Plaintiffs and collected by the District Director of Internal Revenue for the District of Oregon from Plaintiff, The United States National Bank of Portland (Oregon), as Executor of the Estate of Sam J. Wilson, Deceased. Jurisdiction of this action is based on Section 1346(a)(1) of Title 28 of the United States Code, as amended.

II.

During the year 1949, Samuel J. Wilson, also known as Sam J. Wilson, and hereafter referred to as Wilson, and Plaintiff Jessie Wilson, were husband and wife, residing in Washington County, Oregon. Wilson died on October 7, 1950. On the 13th day of October, 1950, The United States National Bank of Portland (Oregon) was duly appointed by the County Court of Washington County, Oregon, as the sole Executor of his estate, and it is still acting in that capacity. During the period from September 1, 1947, until October 30, 1952, Hugh H. Earle was the Collector of Internal Revenue for the District of Oregon, and since October 31, 1952, R. C. Granquist has been and now is the District Director of Internal Revenue for the District of Oregon.

III.

On September 17, 1947, one Samuel A. Agnew, hereinafter called Agnew, instituted suit as Plaintiff against Wilson in the Superior Court of the State of California for the County of Del Norte, Clerk's No. 3801 (Plaintiffs' Exhibit 1), alleging that Agnew employed Wilson to purchase certain

timberlands from the Gilbert-Thorpe Land Co., Inc., in Del Norte County, California, and, for that purpose advanced \$22,000.00 to Wilson; that Wilson did purchase said tract of timber and timberland, using the \$22,000.00 advanced by Agnew, and completed said purchase on or about May 24, 1946; and that title to said timber and timberland was taken in the name of Wilson. Agnew, in his complaint, prayed that Wilson be designated as a trustee for Agnew with relation to said property and that he be required to convey said property to Agnew. Wilson, for answer to said complaint, denied the employment by Agnew and the advancement of the \$22,000.00 to effect the purchase of said timber and timberland, and alleged that he purchased said timberland with his own funds and for his own account. Wilson, by counterclaim and by cross-complaint, attempted to allege the existence of a joint venture between Agnew and Wilson, upon which said counterclaim and cross-complaint issues were not joined, for procedural reasons.

IV.

On July 23, 1948, Wilson instituted suit as Plaintiff against Agnew, in the same Court, Clerk's No. 4060 (Plaintiffs' Exhibit 2), alleging that under an oral agreement of joint venture, made on or about May 15, 1943, under and by which Wilson would search for and examine timberlands suitable for purchase, such lands acceptable would be purchased, Agnew providing the funds necessary therefor; that lands so purchased were to be sold within

a reasonable time for profit; that the profits realized from such sales after deducting all sums advanced by Agnew with interest thereon at 5% per annum, were to be divided equally on tax title lands acquired from governmental sources, and the profits were to be divided 80% to Agnew and 20% to Wilson on lands acquired from private owners; and that on or about July 2, 1946, Agnew refused to recognize any such agreement and denied Wilson's rights in and to the timberlands. Wilson then prayed for the establishment of the joint venture and for a determination and ascertainment of his interests in and to the said timber and timberlands, for an accounting, and for a liquidation by sale or division in kind of the joint venture. To this complaint Agnew answered, denying the existence of a joint venture between Wilson and himself and alleged affirmatively that on or about the spring or summer of 1943, Agnew and Wilson entered into an oral agreement whereby Wilson would sell to Agnew and Agnew would purchase from Wilson certain timberlands in the States of California and Oregon; that pursuant to said agreement, Wilson offered to sell to Agnew certain timberlands then owned by Gilbert-Thorpe Land Co., Inc., (the same property referred to in Case No. 3801—Plaintiffs' Exhibit 1) and the Clutter tract in Curry County, Oregon; that Agnew accepted said offers and paid the purchase price therefor to Wilson; that contrary to said agreement, Wilson took title to these timberlands in his name. Agnew also alleged that pursuant to the oral agreement Agnew advanced and

paid to Wilson for the purchase of timberlands \$350,196.72 of which Wilson diverted to his own use the sum of \$86,217.39 and used \$33,806.00 thereof to acquire timberlands in his own name and refused to account to Agnew therefor. Agnew further alleged that he purchased and paid for a certain tract of tax title land in Curry County, Oregon, but that Wilson wrongfully took title thereto and refused to account for that property or the proceeds therefrom. Agnew prayed for the dismissal of Wilson's complaint and for affirmative relief with relation to each of his three separate counter claims. Wilson answered said cross-complaint, denying the allegations therein, except where consistent with his complaint.

Prior to the date set for trial, Agnew requested the Court, by motion, to determine first the issue as to whether or not a joint venture was entered into between the parties.

V.

On July 24, 1948, Agnew instituted a suit as Plaintiff against Wilson in the same Court, Clerk's No. 4061 (Plaintiffs' Exhibit 3), alleging that Wilson represented on or about October 15, 1945, that Wilson could acquire the capital stock of the Bay Hotel Co., Crescent City, California, for \$86,000.00; that prior to the acquisition of such stock Wilson and Agnew agreed that each party would advance \$43,000.00 toward the cost of such stock and that Wilson would sell the said stock within one year and return to Agnew \$43,000.00 and the parties would

share equally the difference between the purchase price and the selling price thereof; the stock thereafter was acquired by Wilson and on or about August 1, 1946, sold by Wilson, and that the selling price was \$150,000.00. Agnew prayed for the return of his advancement of \$43,000.00 and an accounting and for judgment for any further sums due Agnew. Wilson, by way of answer, denied the agreement between himself and Agnew as to the said hotel stock and further prayed that the suit be dismissed.

VI.

On August 28, 1947, Agnew commenced a suit as Plaintiff against Wilson and Double O Lumber Company, a corporation, O. Ramalia, and O. Bettis in the Circuit Court, Curry County, Oregon, alleging that Wilson was on March 29, 1946, Agnew's agent to purchase certain real property in Curry County, Oregon; and alleged the advancement of \$5,000.00 by Agnew to Wilson for the purchase of said property which Wilson purchased and took title in Wilson's name. Agnew further alleged the sale of said property by Wilson to the other Defendants and prayed for a trust in the property and further return of the \$5,000.00. On Wilson's petition, this case was removed to the United States District Court of Oregon (Civil No. 4251), and thereafter Agnew's motion to remand was denied. Issues were not joined and the case was dismissed with prejudice on March 13, 1950, based upon written stipulation of the parties.

VII.

Prior to the date of trial of the Del Norte County cases, a number of depositions on oral examinations were taken by each party.

VIII.

Subsequent thereto and on November 10, 1949, the said Del Norte County cases came on for trial before the Superior Court of California, for the County of Del Norte. Upon the stipulation of the parties, the three cases were consolidated for trial. By agreement of the parties, Wilson proceeded to the trial of his case for the establishment of the alleged joint venture and first called Agnew as an adverse witness (Plaintiffs' Exhibit 4). After one day of trial, the Court recessed until Monday, November 14, 1949, 10:00 a.m. During the recess of the trial of the said suits, Agnew and Wilson settled and adjusted their differences, as evidenced by a stipulation in writing (Plaintiffs' Exhibit 5), which provided that Wilson was to convey the Gilbert-Thorpe tract to Agnew and Agnew was to convey the Kepner and Clutter tracts to Wilson. Pursuant to said settlement, Wilson retained \$25,000.00 previously advanced by Agnew. Said stipulation also provided for the dismissal with prejudice of all litigation pending between the parties. Thereafter, the provisions of the stipulation were carried into effect by the execution and delivery of appropriate conveyances and mutual releases between Wilson and Agnew. Thereafter and on or about March 9, 1950, the cases were dismissed with prejudice.

IX.

The two tracts of timber and timberland conveyed by Agnew to Wilson in the settlement dated November 14, 1949, involved 1,440 acres in Humboldt County, California, and 1,600 acres in Curry County, Oregon.

Humboldt County Tract

This tract is located in Sections 8, 9, 17, 18, 19, 20 and 29 of Township 9 North, Range 3 East, Humboldt Base and Meridian. This tract was cruised in October and November of 1950, and the cruise (Plaintiffs' Exhibit 6) showed a total of merchantable timber thereon of 58,723 M of the following types and species:

Old Growth Fir	19,386 M
Merchantable Fir	38,612 M
#3 Fir	676 M
Cedar	35 M
Hemlock	14 M
Cedar Poles	5 pcs
Fir Poles	3,155 pcs

The cruise also showed that of the old growth fir, over 50% of the total was peelable. It further disclosed 40,844 M of fir culls.

Curry County Tract

This tract is located in Sections 12, 13, 14, 22, 26, 27, 28, 34, 35 and 36 of Township 36 South, Range 14 West, Willamette Base and Meridian. The tract was cruised in March and April of 1950;

and the cruise (Plaintiffs' Exhibit 7) showed the following quantities and species:

Yellow Fir	38,897 M
Red Fir	770 M
Port Orford Cedar	645 M
White Fir and Other	510 M
<hr/>	
Total	40,822 M

X.

By prior agreement between Wilson and his attorneys, C. E. H. Maloy and William W. Speer, Maloy was to receive 20% and Speer was to receive 10% of any timberlands, other property or money which Wilson might obtain in the said Wilson-Agnew litigation.

XI.

A portion of the Curry County lands was conveyed to William W. Speer on or about May 5, 1950, in full satisfaction of his claim for fees as to the Curry County property received by Wilson in the settlement with Agnew.

XII.

During May of 1950, C. E. H. Maloy by agreement in writing sold to Samuel J. Wilson and Jessie Wilson his 22% interest in the remaining Curry County property received by Wilson in the settlement with Agnew for a total consideration of \$25,000.00 payable as shown in the agreement which is marked Plaintiffs' Exhibit 8.

XIII.

On or about May of 1950, Capitol Timber Company, an Oregon corporation, was formed. The stock record book discloses the total stock issued by said corporation to be 200 shares on that date, of which 169 shares were issued to Wilson, 30 shares to F. J. Howser, and 1 share to C. E. Wheelock. Thereafter, Wilson and Jessie Wilson made a contract in writing (Defendant's Exhibit A) agreeing to sell to said Capitol Timber Company all the Curry County timber and timberlands received by Wilson in the settlement except that portion theretofore conveyed to William W. Speer; that the purchase price was equal to \$10 per M times the merchantable timber thereon payable at such rate as the timber was cut and removed thereafter by Capitol Timber Company.

XIV.

The Humboldt County timberlands were thereafter sold by the Estate of Sam J. Wilson in the course of probate administration on or about April 27, 1951, for \$620,000.00 as per order of the probate court confirming the sale, a certified copy of which is Defendant's Exhibit B. Thirty per cent (30%) of said sales price was paid to Maloy and Speer in accordance with their fee contract.

XV.

Wilson and Jessie Wilson duly filed their joint income tax return for the year 1949 with the Col-

lector of Internal Revenue for the District of Oregon (Defendant's Exhibit C).

XVI.

Under date of July 14, 1954, the Commissioner of Internal Revenue notified Plaintiffs of a deficiency asserted against Wilson and Jessie Wilson for the year 1949 in the amount of \$361,852.06, and an over-assessment for the year 1950 of \$16,789.84 (Defendant's Exhibit D). The principal basis for the deficiency for the year 1949 was the assertion that 70% of the fair market value of the timber and timberlands conveyed by Agnew, as referred to above, constituted the receipt by Wilson of compensation for services rendered, includable in the gross income for the year 1949 under Sec. 22(a) of the Internal Revenue Code of 1939, in the amount of \$502,176.85, plus \$25,000.00 received by Wilson in cash and not received as a non-taxable dissolution of a joint venture between Agnew and Wilson.

XVII.

In said notice of deficiency dated July 14, 1954, the Commissioner of Internal Revenue determined the fair market value of the timber and timberlands received by Wilson in Humboldt County, California, and Curry County, Oregon, to be \$717,395.50 of which Wilson's share was 70% thereof, or \$502,176.85.

XVIII.

On August 27, 1954, Plaintiff, The United States National Bank of Portland (Oregon), Executor of

the Estate of Sam J. Wilson, Deceased, paid to the District Director of Internal Revenue for the District of Oregon the sum of \$437,783.53, representing the deficiency of \$361,852.06 plus interest thereon in the amount of \$96,188.20, less the overassessment for the year 1950 in the amount of \$16,789.84 and interest thereon in the amount of \$3,466.89. Thereafter, and on or about September 8, 1954, Plaintiffs duly filed with the District Director of Internal Revenue their claim for refund (Plaintiffs' Exhibit 9) in the amount of \$437,783.53, upon the grounds that the timberlands received by Wilson in the settlement dated November 14, 1949, represented the nontaxable dissolution of a joint venture and did not constitute compensation for his services; that the values attributed to the timberlands by the Commissioner of Internal Revenue were excessive; and that the Commissioner erred in failing to apply the provisions of Section 107(a) of the Internal Revenue Code of 1939.

XIX.

Under date of January 5, 1955, Plaintiffs received a statutory notice of the disallowance of said refund claim, in accordance with the provisions of Section 6532(a)(1) of the Internal Revenue Code of 1954 (Plaintiffs' Exhibit 10).

XX.

None of the timber or timberlands referred to in the pleadings as having been taken in the name of Agnew was sold or otherwise disposed of prior to

November 14, 1949. No partnership information returns were ever filed by Wilson and Agnew for the years 1943 through 1949, inclusive. Wilson and Agnew never entered into a formal written partnership agreement.

Plaintiffs' Contentions

I.

The nature of the proceeds from the settlement of the litigation between Wilson and Agnew, and the income tax consequences thereof, are determined by the grounds of the suits which were thereby settled. The agreement between Agnew and Wilson (Plaintiffs' Exhibit 5) therefore, constituted the nontaxable dissolution of a joint venture, and the fair market value of the proceeds thereof did not constitute compensation for his personal services.

Plaintiffs, therefore, are entitled to a refund in the sum of \$437,783.53, together with interest as provided by law.

II.

If the Court should, for any reason, determine that 70% of the fair market value of said timberlands constituted compensation to Wilson for his personal services, then, in the alternative, Plaintiffs contend that the fair market value of the Humboldt County timber did not exceed \$2.50 per M and the value of the Curry County timber did not exceed \$4.00 per M.

In that event, Plaintiffs would be entitled to a refund in the amount of \$271,376.45, together with interest as provided by law.

III.

If the Court should, for any reason, determine that 70% of the fair market value of said timberlands constituted compensation to Wilson for his personal services and that such services were performed over a period of thirty-six months or more, to wit: commencing on or about February 15, 1943 (Paragraph 3 of the complaint herein being hereby amended accordingly) and continuing at least through July 2, 1946 (Plaintiffs' Exhibit 10), then in the further alternative, Plaintiffs contend that the maximum income tax on the alleged compensation received therefor was governed by the provisions of Section 107(a) of the 1939 Internal Revenue Code.

In that event, Plaintiffs would be entitled to a refund in the amount of \$317,501.89, together with interest as provided by law.

Defendant's Contentions

I.

That the properties received by Wilson in settlement of the Agnew-Wilson litigation in 1949 constituted payment for services rendered by Wilson to Agnew and taxable as ordinary income for the year 1949 under Sec. 22(a) of the Internal Revenue

Code of 1939; that no joint venture ever existed between Agnew and Wilson.

II.

Alternatively, that if a joint venture did exist, the properties received in the settlement of the Agnew-Wilson litigation in 1949 by Wilson constituted Wilson's share of the profits of the joint venture and taxable as ordinary income under Sec. 22(a) of the Internal Revenue Code of 1939.

III.

Further, if a joint venture did exist, then the settlement of the Agnew-Wilson litigation in 1949 constituted the acquisition of an interest in the assets of the joint venture, which acquisition or transfer resulted in gain to Wilson and is taxable as ordinary income under Sec. 22(a) of the Internal Revenue Code of 1939.

IV.

The fair market values per M of the timberlands received in the settlement of the Agnew-Wilson litigation in 1949 by Wilson were \$6.50 per M in Humboldt County and \$8.00 per M in Curry County.

V.

The properties received in the settlement of the Agnew-Wilson litigation in 1949 were received by Wilson as compensation for services rendered over less than a period of 36 months, and Sec. 107(a) of the Internal Revenue Code of 1939 is therefore inapplicable.

Issues to Be Determined

Plaintiffs contend that the issue is as follows:

I.

Whether what Wilson received by reason of the litigation with Agnew and the written settlement agreement between them constituted compensation for his personal services, as contended by Defendant, or proceeds from the dissolution of a joint venture and, therefore, nontaxable, as contended by Plaintiffs.

Defendant contends that the issues are as follows:

I.

Whether a joint venture between Agnew and Wilson existed during the years 1943 through 1946, inclusive.

II.

If no joint venture existed between Agnew and Wilson between the years 1943 and 1946, inclusive, did the receipt of the property constitute compensation for services rendered by Wilson.

III.

If a joint venture existed between Agnew and Wilson, did the receipt of the property constitute a distribution of the profits of the joint venture to Wilson.

IV.

If a joint venture existed between Agnew and Wilson, did the settlement agreement transfer an interest in the assets of the joint venture to Wilson.

Agreed Issues

I.

If the Court decides that the fair market value of the properties received by Wilson in the settlement of the Agnew-Wilson litigation constituted compensation for his personal services rendered by him or otherwise ordinary income to him under Section 22(a) of the Internal Revenue Code of 1939, then the Court is to determine the fair market value in November, 1949, of the timber and timberlands in Humboldt and Curry Counties.

II.

If the Court decides that the fair market value of the properties received by Wilson in the settlement of the Agnew-Wilson litigation constituted compensation for his personal services rendered by him or otherwise ordinary income to him under Section 22(a) of the Internal Revenue Code of 1939, then the Court is to determine over what period of time the services were performed, and therefore, whether Section 107(a), Internal Revenue Code of 1939, is applicable.

Exhibits

The following exhibits were marked for identification at the pretrial conference:

Plaintiffs' Exhibits

Plaintiffs' Exhibit 1: Pleadings in the case of Samuel A. Agnew v. Samuel J. Wilson, No. 3801,

in the Superior Court of the State of California for Del Norte County.

Plaintiffs' Exhibit 2: Pleadings in the case of Samuel J. Wilson v. Samuel A. Agnew, No. 4060, in the Superior Court of the State of California for Del Norte County.

Plaintiffs' Exhibit 3: Pleadings in the case of Samuel A. Agnew vs. Samuel J. Wilson and Eva Wilson, No. 4061, in the Superior Court of the State of California for Del Norte County.

Plaintiffs' Exhibit 4: Transcript of testimony at consolidated trial of the above cases.

Plaintiffs' Exhibit 5: Stipulation for settlement of the above cases.

Plaintiffs' Exhibit 6: Cruises on Humboldt County timber.

Plaintiffs' Exhibit 7: Cruises on Curry County timber.

Plaintiffs' Exhibit 8: Agreement of May, 1950, between C. E. H. Maloy, et ux., and Samuel J. Wilson, et ux.

Plaintiffs' Exhibit 9: Deposition of Samuel A. Agnew taken in the instant case.

Plaintiffs' Exhibit 10: Summary of checks and certain checks of S. A. Agnew.

Plaintiffs' Exhibit 11: Refund claim for plaintiffs for the year 1949.

Plaintiffs' Exhibit 12: Statutory notice of disallowance of Plaintiffs' refund claim.

Defendant's Exhibits

Defendant's Exhibit A: Contract of sale dated May, 1950, between Wilson and wife, and Capitol Timber Company.

Defendant's Exhibit B: Order confirming sale of real estate on bid in open court by Superior Court, Del Norte County, California.

Defendant's Exhibit C: Joint individual income tax return, Form 1040, filed by Sam J. Wilson and Jessie Wilson for the calendar year 1949.

Defendant's Exhibit D: Deficiency notice dated July 14, 1954, with statement attached.

Defendant's Exhibit E: Individual income tax return, Form 1040, filed by Sam J. Wilson for the calendar year 1945.

Defendant's Exhibit F: Individual income tax return, Form 1040, filed by Sam J. Wilson for the calendar year 1946.

Defendant's Exhibit G: Individual income tax return, Form 1040, filed by Sam J. Wilson for the calendar year 1947.

Defendant's Exhibit H: Individual income tax return, Form 1040, filed by Sam J. Wilson, for the calendar year 1948.

Defendant's Exhibit I: Joint individual income tax return, Form 1040, filed by Jessie Wilson and Sam J. Wilson, Deceased, for the calendar year 1950.

Defendant's Exhibit J: Amended joint individual income tax return, Form 1040, filed by Jessie

Wilson and Sam J. Wilson, Deceased, for the calendar year 1950.

Defendant's Exhibit K: Second amended joint individual income tax return, Form 1040, filed by Jessie Wilson and Sam J. Wilson, Deceased, for the calendar year 1950.

Defendant's Exhibit L: Application to purchase signed by Wilson for Agnew.

Defendant's Exhibit M: Statement of monies paid to Wilson.

Defendant's Exhibit N: Deposition of Wilson in Del Norte County cases.

Defendant's Exhibit O: Certified copies of certain drafts.

Defendant's Exhibit P:

- (1) Letter from Wilson to Agnew 1-22-44.
- (2) Letter from D. K. to Wilson 2-3-44.
- (3) Letter from Agnew to Wilson 2-11-44.
- (4) Letter from Wilson to Barkus 2-15-44.
- (5) Letter from Wilson to Agnew 7-30-44.
- (6) Letter from Wilson to Agnew 7-30-44.
- (7) Letter from Wilson to Agnew 10-24-44.
- (8) Letter from Wilson to Agnew 11-3-44.
- (9) Letter from Wilson to Agnew 11-7-44.
- (10) Letter from Wilson to Agnew 1-4-45.
- (11) Letter from Wilson to Agnew 1-4-45.
- (12) Telegram from Wilson to Agnew 1-16-45.
- (13) Letter from Wilson to Agnew 3-6-45.
- (14) Telegrams from Wilson to Agnew
3-14-45.
- (15) Telegrams from Wilson to Agnew
3-28-45.

- (16) Letter from Wilson to Agnew 3-27-45.
- (17) Letter from Wilson to Agnew 3-27-45.
- (18) Letter from McCutcheon, et al., to
Wilson 7-5-45.
- (19) Letter from Wilson to Agnew 7-26-45.
- (20) Letter from Wilson to Agnew 8-7-45.
- (21) Letter from Wilson to Agnew 8-11-45.
- (22) Letter from Wilson to Agnew 8-24-45.
- (23) Letter from Wilson to Agnew 8-24-45.
- (24) Telegram from Agnew to Wilson
12-22-45.
- (25) Letter from Wilson to Agnew 2-11-46.
- (26) Letter from Wilson to Agnew 6-19-46.
- (27) Letter from Wilson to Agnew 5-31-46.
- (28) Letter from Wilson to Agnew 7-3-46.
- (29) Letter from Wilson to Agnew 7-12-46.
- (30) Letter from Wilson to Agnew 7-28-46.
- (31) Letter from Wilson to Agnew 11-30-46.
- (32) Letter from California Veneer to Wil-
son 12-11-46.
- (33) Letter from Wilson to Agnew 3-6-47.
- (34) Letter from Wilson to Agnew 4-5-47.
- (35) Letter from Agnew to Wilson 4-10-47.
- (36) Letter from Wilson to Agnew 4-16-47.
- (37) Letter from Wilson to Agnew 6-21-47.
- (38) Letter from Agnew to Wilson 7-9-47.
- (39) Letter from Agnew to Wilson 12-17-47.
- (40) Letter from Wilson to Agnew 12-3-47.
- (41) Letter from Wilson to Cunningham
2-16-50.

Defendant's Exhibit Q: Contract to purchase
tax title property, Curry County, Oregon.

Defendant's Exhibit R: Estate Tax Return, Estate of Sam J. Wilson, Deceased.

It is agreed between the parties that if the Court should find that Plaintiffs are entitled to any recovery from Defendant that the amount of the judgment will be agreed upon between the parties and submitted to the Court. In the event of disagreement between the parties, the conflicting computations will be submitted to the Court for determination.

It is agreed by the parties that this pretrial order will govern the course of the trial and will not be amended, except by consent or to prevent manifest injustice.

The Court finding that the foregoing clearly and accurately reflects the pretrial conference had herein and the stipulations and agreements of the parties, and amendments to the pleadings, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pretrial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the Court.

Dated this 25th day of October, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge.

Approved:

/s/ C. E. WHEELOCK,

Of Attorneys for Plaintiffs;

/s/ EDWARD J. GEORGEFF,

Of Attorneys for Defendant.

[Endorsed]: Filed October 25, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Even though there be doubt whether the authorities relied on by plaintiffs re settlement after litigation, apply to the facts here presented, I have no hesitation in finding on the record made, that Wilson and Agnew were engaged in a joint venture¹, and that this was dissolved by the settlement agreement of November 14, 1949.

I find that Wilson's business relations with Agnew began in January, 1943, and continued until June, 1946.

Dated: November 29, 1955.

/s/ CLAUDE McCOLLOCH,

Judge.

[Endorsed]: Filed November 29, 1955.

¹Joint ventures of the sort engaged in by Wilson and Agnew, for the discovery, development and sale of natural resources (minerals, timber, water power, etc.) have been familiar practice in the Western States.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch, Chief Judge of the above-entitled Court at Portland, Oregon, on the 25th and 26th days of October, 1955, plaintiffs appearing by C. E. Wheelock, Carl E. Davidson and Charles P. Duffy, their attorneys, and defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon and Allen A. Bowden, Attorney, Department of Justice, Washington, D. C., and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein; and

The Court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised, does make the following:

Findings of Fact

I.

Plaintiffs instituted this action to recover individual income taxes assessed against plaintiffs by the Commissioner of Internal Revenue of the United States and collected from plaintiff, The United States National Bank of Portland (Ore-

gon) as executor of the Estate of Sam J. Wilson, Deceased, by the District Director of Internal Revenue for the District of Oregon. Jurisdiction of this action exists by virtue of Section 1346(a)(1) of Title 28, United States Code.

II.

During the year 1949, Samuel J. Wilson, also known as Sam J. Wilson, and plaintiff Jessie Wilson were husband and wife, residing in Washington County, Oregon. Sam J. Wilson died on October 7, 1950. On the 13th day of October, 1950, The United States National Bank of Portland (Oregon) was duly appointed by the County Court of Washington County, Oregon, as the sole executor of his estate, and it is still acting in that capacity. During the period from September 1, 1947, until October 30, 1952, Hugh H. Earle was the Collector of Internal Revenue for the District of Oregon, and since October 31, 1952, R. C. Granquist has been and now is the District Director of Internal Revenue for the District of Oregon.

III.

In January, 1943, Samuel J. Wilson (hereinafter called "Wilson") entered into an oral agreement of joint venture with one Samuel A. Agnew (hereinafter called "Agnew"), by the terms of which they mutually agreed that Wilson would search for and examine various timberlands, locate the same and determine their suitability for purchase for later resale at a profit. It was mutually agreed that Agnew would furnish the necessary funds for the

purchase of such timberlands as were selected by Wilson. It was further understood and agreed between them that all of said timberlands were to be sold within a reasonable time and that any profit resulting therefrom on timberlands acquired from any state, county or political subdivision of any state at a tax sale were to be divided equally between Wilson and Agnew and that profits derived from the sale of timberlands acquired from private owners were to be divided on the basis of 80% thereof to Agnew and 20% to Wilson.

IV.

Commencing in January, 1943, and continuing until June, 1946, Wilson, pursuant to the terms of said agreement of joint venture, performed the agreed personal services for the joint venture and located certain desirable timberlands which were thereafter purchased by him in the name of Agnew with funds supplied by Agnew. None of said timberlands was sold or otherwise disposed of during the existence of the said joint venture between Wilson and Agnew.

V.

On or about the 2nd day of July, 1946, Agnew refused to recognize that Wilson had any right, title, interest or claim to such timberlands and attempted to repudiate the joint venture agreement hereinbefore described. Thereafter, and on the 23rd day of July, 1948, Wilson instituted a suit against Agnew in the Superior Court of the State of Cali-

for the County of Del Norte, praying that the joint venture of Agnew and himself be established; that Wilson's interest in the timberlands be determined; and that said interest be liquidated and sold or that the timberlands be divided in kind between Agnew and Wilson. The question was put at issue by appropriate pleadings of Agnew and Wilson. Agnew requested the Court, by motion, to determine first the issue as to whether a joint venture was entered into between the parties. On the 10th day of November, 1949, the case came on for trial before said Court, together with two related cases which were consolidated pursuant to a stipulation of the parties. Wilson proceeded to the trial of his case for the establishment of a joint venture. After one day of trial Agnew and Wilson settled and adjusted their differences, as evidenced by a written stipulation between them. The settlement agreement provided, in part, that Agnew was to convey to Wilson a tract of timber located in Humboldt County, California, and a tract of timber located in Curry County, Oregon. Pursuant to said settlement, Wilson also retained \$25,000.00 previously advanced by Agnew. The stipulation further provided for the dismissal with prejudice of all litigation pending between the parties. Thereafter, the provisions of the settlement agreement were carried into effect by the execution and delivery of appropriate conveyances and mutual releases between Wilson and Agnew, and on or about March 9, 1950, the cases were dismissed with prejudice.

VI.

Wilson and his wife, Jessie Wilson, duly filed their joint income tax return for the year 1949 with the Collector of Internal Revenue for the District of Oregon. In such return the dissolution of the joint venture with Agnew was duly reported as a nontaxable dissolution of a joint venture, except for the cash received by Wilson.

VII.

Under date of July 14, 1954, the Commissioner of Internal Revenue notified plaintiffs of a deficiency asserted against them for the year 1949 in the amount of \$361,852.06 and an overassessment for the year 1950 of \$16,789.84. The basis for the deficiency for the year 1949 was the assertion that 70% of the fair market value of the timberlands conveyed to Wilson by Agnew (the remaining 30% being received by the attorneys for Wilson in said proceedings) constituted the receipt by Wilson of compensation for services rendered rather than the receipt of property in dissolution of the joint venture between Agnew and Wilson.

VIII.

On August 27, 1954, plaintiff, The United States National Bank of Portland (Oregon), Executor of the Estate of Sam J. Wilson, Deceased, paid to the District Director of Internal Revenue for the District of Oregon the sum of \$437,783.53, representing the deficiency of \$361,852.06 plus interest thereon in the amount of \$96,188.20, less the overassessment

for the year 1950 in the amount of \$16,789.84 and interest thereon in the amount of \$3,466.89. Thereafter, and on or about September 8, 1954, plaintiffs duly filed with the District Director of Internal Revenue their claim for refund in the amount of \$437,783.53, upon the grounds that the timberlands received by Wilson in the settlement dated November 14, 1949, represented the nontaxable dissolution of a joint venture and did not constitute compensation for his services; that the values attributed to the timberlands by the Commissioner of Internal Revenue were excessive; and that the Commissioner erred in failing to apply the provisions of Section 107(a) of the Internal Revenue Code of 1939.

IX.

Under date of January 5, 1955, plaintiffs received a statutory notice of the disallowance of said refund claim, in accordance with the provisions of Section 6532(a)(1) of the Internal Revenue Code of 1954.

X.

The agreement between Agnew and Wilson of November 14, 1949, effected the dissolution of the joint venture theretofore existing between them. The conveyance of the timberlands to Wilson did not constitute a distribution of profits or anticipated profits of the joint venture.

From the foregoing findings of fact, the Court draws the following:

Conclusions of Law

I.

The agreement between Agnew and Wilson of November 14, 1949, constituted the nontaxable dissolution of a joint venture and the fair market value of the proceeds thereof did not constitute compensation for Wilson's personal services. The conveyance of the timberlands to Wilson was a part of the division in kind between Agnew and Wilson of the assets of the joint venture.

II.

The fair market value of the timberlands conveyed to Wilson in the year 1949 did not give rise to the receipt by him in that year of taxable income, except to the extent of the cash received by him, which amount of cash was duly reported by him in the joint income tax return filed with Jessie Wilson in the year 1949.

III.

By reason of the foregoing, plaintiffs are entitled to recover the sum of \$437,783.53, plus interest thereon at the rate of 6% per annum from August 27, 1954, and for their allowable costs and disbursements incurred herein.

Dated at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed December 8, 1955.

The United States District Court
for the District of Oregon
Civil No. 8011

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the
Estate of Sam J. Wilson, Deceased, and
JESSIE WILSON,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch, Chief Judge of the above-entitled Court at Portland, Oregon, on the 25th and 26th days of October, 1955, plaintiffs appearing by C. E. Wheelock, Carl E. Davidson and Charles P. Duffy, their attorneys, and defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, and Allen A. Bowden, Attorney, Department of Justice, Washington, D. C., and the parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pretrial order previously made and entered herein; and

The Court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Fact and

Conclusions of Law have heretofore been signed by the Court and entered of record on the 8th day of December, 1955.

Now, Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$437,783.53, plus interest thereon at the rate of 6% per annum, from August 27, 1954, and for their allowable costs and disbursements incurred herein.

Dated at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The United States National Bank of Portland (Oregon), Executor of the Estate of Sam J. Wilson, Deceased, and Jessie Wilson; and to C. E. Wheelock, Carl E. Davidson and Charles P. Duffy, 1525 Yeon Building, Portland 4, Oregon, Their Attorneys:

Notice Is Hereby Given that the United States of America, defendant above named, hereby appeals

to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 8th day of December, 1955, in favor of plaintiffs and against defendant.

Dated: February 6, 1956.

C. E. LUCKEY,
United States Attorney,
District of Oregon;

/s/ EDWARD J. GEORGEFF,
Asst. United States Attorney.

[Endorsed]: Filed February 6, 1956.

United States District Court, District of Oregon
Civil No. 8011

THE UNITED STATES NATIONAL BANK
OF PORTLAND (OREGON), Executor of
the Estate of Sam J. Wilson, Deceased, and
JESSIE WILSON,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

October 25, 1955

Before: Honorable Claude McColloch, Chief Judge.

Appearances:

CARL E. DAVIDSON,
CHARLES P. DUFFY,
C. E. WHEELOCK,

Attorneys for Plaintiffs.

C. E. LUCKEY,

U. S. Attorney for the District of Oregon;

EDWARD J. GEORGEFF,

Assistant U. S. Attorney, and

ALLEN A. BOWDEN,

Attorney, Department of Justice,

Of Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

The Clerk: United States National Bank of Portland, Executor of the Estate of Sam J. Wilson, deceased, and Jessie Wilson, Plaintiffs, vs. The United States, Defendant.

Mr. Duffy: The plaintiffs are ready.

Mr. Georgeff: The defendant is ready, your Honor.

I would like to move the special admittance of Allen A. Bowden, of the Tax Division, Department of Justice, for the purpose of this case. We have a motion filed for his admittance.

The Court: So ordered. Put on your witnesses, Mr. Duffy.

Mr. Duffy: May it please the Court, our first and principal issue we have no witnesses upon. For

that reason I would like to beg the indulgence of the Court for a brief statement of our position.

The Court: All right.

Mr. Duffy: This is an action by the United States National Bank as Executor of the Estate of Sam Wilson, Deceased, and Jessie Wilson is also named as plaintiff.

Mr. Wilson died in October of 1950. Back in the early part of the year 1943, Mr. Wilson and one Samuel A. Agnew, who is a lumberman in Centralia, Washington, entered into an agreement, an oral agreement, in which it was agreed that Wilson would search for various timberlands in the States of Oregon and California, both county lands and privately-held lands.

The agreement between them was that they would find a particular parcel of real property having valuable [2*] timber on it, and Wilson would recommend the purchase of that timberland. Agnew would put up the money, and it was agreed that the title to the timberland would be taken in the name of Agnew.

Now, that went along for a number of years. Various tracts of timberlands were acquired, and the titles to those tracts were taken in the name of Agnew. In 1947, however, Mr. Agnew denied that there was any joint venture between them as Mr. Wilson contended, so they started to sue one another down in the Del Norte, California, courts. There were three of those cases filed in Del Norte

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

County, and the pleadings in those cases are Plaintiffs' Exhibits 1, 2 and 3. In those cases there were charges and countercharges, but the principal issue between them was the suit by Wilson for the establishment of a joint venture between them. Those cases were consolidated for trial and came on for trial on November 10, 1949.

After the cases had started and one day's testimony had been taken, Mr. Agnew being called as an adverse witness, the trial was recessed from Thursday until the following Monday. During that period of time the parties arrived at a settlement. On Monday, November 14th, 1949, a stipulation was entered into between the parties in which it was agreed that certain tracts of timberlands would be conveyed to Wilson and certain other tracts to Agnew, and the [3] parties would exchange mutual releases between them. Thereafter that settlement was carried out.

Sam Wilson and his wife Jessie Wilson, who is a co-plaintiff in this case and who appears as a plaintiff only because they filed a joint return for that year, filed an income tax return for the year 1949, in which they reported the fact of the dissolution of this joint venture and contended that because it was such it was nontaxable. The Government came in after that time and said that it was not a non-taxable dissolution of the joint venture but constituted compensation to Wilson for his personal services. They said that the value of the timberlands which Wilson received in that settlement was ordinary income to him, and they said the

value of those timberlands was some \$700,000. They set up rather a substantial deficiency against Sam Wilson and against his executor at that time, and thereafter that amount was paid by The United States National Bank as Executor and a refund claim was filed.

Our first principal contention also appears in the refund claim, of course, and is that the property which Wilson received in the settlement of this litigation constituted the receipt by him of assets in the dissolution of a joint venture and is therefore nontaxable; or, in the first alternative, that if the Court should find that was not the fact, but that this was compensation for his personal services, then we contend [4] that the timberlands were overvalued by the Government in determining the amount of compensation; and, as the second alternative, the fact that these services took place over a period of more than 36 months and therefore they are entitled to spread the income over the years in which the services were performed, under the provisions of Section 107(a) of the old Code, the 1939 Code.

On this first contention it is the plaintiffs' position that the character of the proceeds received by Wilson in the litigation is determined by the nature of the claim which was thereby settled, so that in support of our first principal contention we offer Plaintiffs' Exhibits 1, 2 and 3, which are the pleadings in the three suits in Del Norte County, California, and Plaintiffs' Exhibi 4, which is the tran-

script of the first day's testimony at those consolidated trials, Plaintiffs' Exhibit 5, which is the written stipulation for the settlement of those cases, and also Plaintiffs' Exhibits 11 and 12, which are the refund claims and the statutory notice of disallowance. The remaining facts in connection with our principal contention are embodied in the pretrial order.

There is no substantial dispute about the facts here. The first alternative that we have deals with the valuation of the timberlands in Curry County, Oregon, and Humboldt County, California. The Government valued the [5] Curry County lands at \$8.00 per thousand and the Humboldt County lands at \$6.50 per thousand, whereas the plaintiffs contend that the values in November of 1949, when the settlement was effected, did not exceed \$4.00 per thousand on the Curry County lands and \$2.50 on the Humboldt County, California, lands.

The Court: Following the usual practice in tax cases, all of the exhibits identified by the pretrial order are deemed to have been offered and admitted in evidence, and are admitted in evidence subject to all objections that may have been heretofore stated or may hereafter be stated prior to the final submission of the case.

(The documents referred to and identified in the pretrial order, having been previously marked as pretrial exhibits by the reporter, were received in evidence as Plaintiffs' Exhibits 1 to 12, inclusive, and Defendant's Exhibits

A to L, inclusive, Defendant's Exhibit N, Defendant's Exhibits P, Q and R, respectively.)

Mr. Duffy: The plaintiffs will call Mr. Newhouse. [6]

S. O. NEWHOUSE

was produced as a witness in behalf of the Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Where do you reside, Mr. Newhouse?

A. Wedderburn, Oregon.

Q. In what county?

A. Wedderburn is located in Curry County.

Q. What is the county seat of Curry County?

A. Gold Beach.

Q. Where is Wedderburn located with reference to Gold Beach?

A. Directly across the river on the north side from Gold Beach.

Q. What is your business, Mr. Newhouse?

A. Real estate broker.

Q. How long have you been engaged in that business?

A. 18 or 19 years, all in Curry County.

Q. Were you actively engaged in that business in the year 1949? A. Yes.

Q. How extensive were your transactions as a broker in timber in Curry County?

(Testimony of S. O. Newhouse.)

A. The largest percentage of my real estate business was timber and timber sales. [7]

Q. Did you handle a number of sales in the year 1949? A. I did.

Q. Are you familiar with the timberland owned by Sam Wilson in Township 36 South, Range 14 West of the Willamette Meridian? A. I am.

Q. Have you ever handled any of that timber for sale?

A. I sold one tract that was involved in this settlement between Sam Agnew and Sam Wilson. One of the lawyers received it, as I understand it, in part payment for his services.

Q. What was that lawyer's name?

A. Spears.

Q. In other words, you sold a piece—I believe it is covered in the pretrial order—that Spear received from Sam Wilson. When was that sale made?

A. The sale was made, as I recall, in '49.

Q. Do you remember the price at which it was sold? A. Approximately \$3.80 a thousand.

Q. That was in what part of '49, would you say?

A. Well, I think I have it written down here. I better check it. I was mistaken. The deal was closed in 1950. I am not certain whether it was made in '49 or not. The deal was closed in 1950.

Q. Now, were you familiar with the values of timberlands [8] in Curry County in 1949 and 1950?

A. Yes.

Q. What was the trend of prices between No-

(Testimony of S. O. Newhouse.)

vember 14, 1949, and 1950? Were they up in 1950, or did they go down?

A. Timber sales in 1949 in Curry County were very few. There was a slump in lumber prices. In 1950, why, there was a considerable amount of timber changed hands.

Q. Based upon your experience and knowledge of timber values in Curry County in 1949, what is your opinion as to the fair market value of the Wilson tract in Township 36 South, Range 14 West, on November 14, 1949, per thousand?

A. In my opinion the average price of this timber involved was approximately \$4.50 a thousand.

Q. That would be your estimate of the market value? A. Yes.

Q. At that time? A. Yes.

Q. That is your estimate of the value of the timber? A. Yes.

Q. In such a sale would there be any additional value allocated to the land?

A. In my opinion at that time, no.

Mr. Davidson: You may cross-examine. [9]

Cross-Examination

By Mr. Bowden:

Q. Mr. Newhouse, have you acquainted yourself with the cruises that were made of that particular timber in the early part of 1950?

A. Yes. They were available to me at that time.

Q. You acquainted yourself with the amount of timber on that particular tract in Curry County?

(Testimony of S. O. Newhouse.)

A. Yes.

Q. Are you acquainted with any other sales of this precise timber at or about the early part of 1950 or the latter part of 1949?

A. Well, I made probably around 35 or 40 sales of timber in that area during that time.

Q. I was referring to this particular timber that was owned by Mr. Wilson.

A. I beg your pardon. I don't follow your question.

Q. Mr. Wilson owned certain timber in Curry County in 1949? A. Yes.

Q. Now, you have stated that there was a sale of that timber, of that particular timber, by Mr. Spears. Are you acquainted with any other sale of that precise timber on or about November, 1949, or the early part of 1950?

A. Well, as far as I know, there wasn't any other Sam Wilson timber sold in '49, outside of this sale I made, that Spears [10] got in the deal.

Q. That was the only sale that you know of, of that particular timber, is the one that was made by Mr. Spears?

A. What do you mean by "that particular timber"? You mean particular timber in that particular area or the Sam Wilson timber?

Q. I mean the Sam Wilson timber.

A. Well, Sam Wilson owned other timber there that was sold earlier than that in that immediate vicinity, and I handled the sale of that.

(Testimony of S. O. Newhouse.)

Mr. Bowden: Your Honor, I would like to show him the cruise of that particular timber so he may refresh his recollection as to just the timber we are referring to that we are valuing in this case. That cruise is Plaintiffs' Exhibit No. 7.

Q. This is an agreed cruise of the timber that you are valuing, that you have placed a value of \$4.50 a thousand on. You said that you were acquainted with a sale by Mr. Spears in the early part of 1950. Now, are you acquainted with any other sales of this timber, the cruise of which you have in your hand, in or around the early part of 1950?

A. Well, there was one—I am not certain of the dates. That is a little too far back to get down to the exact year. But the Double O Lumber Company, or the parties involved in the Double O Lumber Company, bought some timber—I think [11] it was in Section 36, 14. I am not certain whether that was in 1950 or not. Is that the one you are referring to?

Mr. Bowden: No. There are no further questions, your Honor.

Redirect Examination

By Mr. Davidson:

Q. Just a moment, Mr. Newhouse. Are you familiar with timber values in Humboldt County, California, on or about November 14, 1949?

A. Only casually. I had timber listed for sale in Northern California during that period.

(Testimony of S. O. Newhouse.)

Q. In general, what was the relationship of the market values of timber, fir timber, in Humboldt County at that time as compared with fir timber in Curry County? A. It was somewhat less.

Mr. Davidson: That is all. Thank you.

Mr. Bowden: That is all.

(Witness excused.) [12]

OLIVER W. BETTES

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Where do you reside, Mr. Bettes?

A. In Gold Beach.

Q. Is that Curry County, Oregon?

A. Yes.

Q. How long have you lived there?

A. About 10 years.

Q. You lived there, then, during the year 1949?

A. In that vicinity, yes, in or near Gold Beach.

Q. What is your business?

A. Sawmill, lumberman.

Q. Are you operating by yourself or with others? A. I have a partner.

Q. What is the name of your company?

A. Gold Beach Lumber Manufacturing Company and Ocean View Lumber Company.

(Testimony of Oliver W. Bettes.)

Q. What was your business in the year 1949 down there?

A. In the Double O Lumber Company at that time.

Q. Were you a partner in that company?

A. Yes, sir.

Q. Did you or your company purchase timber in Curry County [13] in the year 1949, or at about that time? A. Yes.

Q. Are you familiar with the timber owned by Sam Wilson in Township 36 South, Range 14 West, in Curry County? A. Yes.

Q. Have you ever purchase any of that timber?

A. Yes.

Q. When was that?

A. 1947, we bought—or in '48 we bought 16,000,-000 feet of that Sam Wilson tract.

Q. What price did you pay for it at that time?

A. \$3.00.

Q. \$3.00 per thousand? A. Right.

Q. Are you familiar with fir timber values in Curry County during the year 1949?

A. Pretty well, yes.

Q. What, in your opinion, was the fair market value per thousand of the Curry County tract of Sam Wilson on November 14th, 1949?

A. Well, \$4.50 would be the absolute limit.

Q. It would be no more than \$4.50?

A. No more.

Q. Now, in speaking of that price of timber

(Testimony of Oliver W. Bettes.)

would there be any additional amount paid or allowed for the land value [14] itself?

A. The land was not considered to be worth anything at that time.

Q. Are you familiar at all with fir timber values in Humboldt County in 1949, Humboldt County, California?

A. No, I am afraid not.

Mr. Davidson: You may examine.

Cross-Examination

By Mr. Bowden:

Q. Could you tell me whether you purchased the 16,000,000 feet from Sam Wilson in the early part of 1948 or in the latter part of 1949?

A. It was September, 1947, that the original deal was made. Later the deal was altered in 1948 or '49—in 1949, it was, the contract was revised somewhat.

Q. Is the timber that you purchased in an area close to the timber that is presently under consideration?

A. Yes, it is more or less surrounded by this in question.

Q. Have you acquainted yourself with the cruises that were made in the early part of 1950 of the Curry County timber?

A. No, except that part that we purchased.

Q. Did you go on the Curry County timber that is presently under consideration for the purpose of examining it and for the purpose of testifying at this trial? [15]

A. No.

(Testimony of Oliver W. Bettes.)

Q. You haven't been on that timberland?

A. Oh, yes.

Q. When were you last on it, do you recall?

A. Well, I have been on it frequently, ever since we bought that timber.

Q. So you are acquainted with the type of timber that did grow on that particular land?

A. Oh, yes.

Q. In 1949? A. Yes.

Mr. Bowden: I have no further questions.

Mr. Davidson: That is all.

(Witness excused.) [16]

JAMES M. WELLS

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Where do you reside, Mr. Wells?

A. Redding, California.

Q. What is your present business?

A. I am in the wholesale lumber business.

Q. How long have you resided in Redding?

A. Since early 1949.

Q. What was your business or occupation in or around Redding in the year 1949?

A. I was the manager of the Trinity County Timber Company.

(Testimony of James M. Wells.)

Q. Were you interested in that company?

A. Yes.

Q. Was that a corporation? A. Yes.

Q. What was your duty in connection with that company in 1949?

A. Primarily it was management of the timber, the fire protection, taxes, and so forth, and also in an endeavor to dispose of the timber by selling.

Q. Did you make efforts to sell that timber in the year 1949? [17] A. Yes.

Q. Did you sell it? A. No.

Q. Where was the timber in which you were interested located with reference to Township 9 North, Range 3 East, Humboldt Meridian?

A. It was south and east about 25 miles. That is, speaking of the centers of the tracts.

Q. Did you talk to people that year in connection with the sale of your timber about timber values? A. Yes.

Q. And as a result of your experience in the year 1949 did you reach a conclusion as to the timber values in Humboldt County, California?

A. Yes.

Q. Have you ever been on the Wilson tract in Humboldt County? A. Never have.

Q. I mean the tract that is located as I have described here. I want to ask you, as a result of your experience and knowledge, what is your opinion as to the value on November 14, 1949, of a tract in Sections 8, 9, 17, 18, 19, 20 and 29 of Township 9 North, Range 3 East, containing 19,000,000 feet

(Testimony of James M. Wells.)

of old-growth fir, approximately 50 per cent peelable, and 38,000,000 feet of merchantable fir, in that particular area?

A. I would say that it would have a top value of \$2.00, and [18] it would be very questionable whether it could be sold at that.

Q. That is, on November 14th, 1949?

A. That is right.

Q. What was the general situation of timber values, particularly fir timber in Humboldt County, in the latter part of 1949?

A. The area that I was particularly interested in—I don't believe there was any major sale made in 1949. There were numerous small sawmills went out of business. The market was bad, and timber was not moving. I contacted several large companies and couldn't arouse any interest at all.

Q. In estimating your per-thousand price did you take into consideration any value that might be attached to the land?

A. At that time I believe the prices always included the land as a part of the price.

Q. In other words, your \$2.00 price would include the timber and land on which it stood?

A. Yes.

Mr. Davidson: You may cross-examine.

(Testimony of James M. Wells.)

Cross-Examination

By Mr. Bowden:

Q. Is it not true that the timber business and the price on sales of timber is sometimes determined by the time of the [19] year; that there are certain seasonal fluctuations in the timber business by reason of weather and by reason of roads?

A. I think that is true, yes.

Mr. Bowden: I have no further questions.

Mr. Davidson: That is all. [20]

* * *

ELMER BANKUS

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowden:

Q. Mr. Bankus, where do you reside?

A. Brookings, Oregon.

Q. How long have you been residing in Brookings? A. Since 1933.

Q. What is your present business in Brookings?

A. A public utility, water department, privately owned.

Q. Did there come a time in or around the years 1943, '44, '45 or '46 that you had occasion to sell a tract of timber which you owned at that time?

(Testimony of Elmer Bankus.)

A. Yes.

Q. Do you recall to whom you sold?

A. To Sam Agnew.

Q. Do you recall the price that was paid by Mr. Agnew for that particular timber?

A. \$100,000.

Q. Did there come a time in that transaction when you entered into an escrow agreement regarding the sale of that particular timber?

A. Yes, there was.

Q. Do you recall from an examination of the escrow agreement [37] that Mr. Wilson's name appeared thereon?

A. Yes.

Q. Do you recall what his full name was?

A. Sam Wilson. I don't remember whether he had a middle initial or not.

Q. Do you recall how he was represented on that escrow agreement?

Mr. Duffy: Excuse me. What was the question, please?

(Last question read.)

Q. (By Mr. Bowden): Do you recall how Mr. Wilson's name appeared on the escrow agreement?

A. As agent.

Q. As agent for whom?

A. Sam Agnew.

Mr. Duffy: Just a minute, please. The plaintiffs will object to all this line of testimony seeking to go into and retry this joint venture litigation. Plaintiffs would like to record their objection to any testimony which attempts to go into the individual

(Testimony of Elmer Bankus.)

transactions or attempts to relitigate the issues which were decided in the settlement in the Del Norte County cases.

The Court: He may answer subject to the objection.

Q. (By Mr. Bowden): Prior to the time that this escrow agreement was entered into, did Mr. Wilson have occasion to discuss with you the possibility of your selling this particular [38] timber?

A. Yes.

Q. Do you recall how Mr. Wilson held himself out at that time in respect to Mr. Agnew?

A. As his agent.

Mr. Duffy: Plaintiffs will make the further objection that the testimony of this witness is not the best evidence. If there was a written escrow agreement, it should be produced.

Mr. Bowden: Your Honor, Mr. Bankus came into town this morning and he has brought with him the original of that document. We were unable to procure it prior to that time. I would like to offer that document as one of the Government's exhibits, with your permission.

The Court: Admitted, subject to Mr. Duffy's objection.

(The Escrow Agreement referred to was marked as Defendant's Exhibit W for Identification.)

Q. (By Mr. Bowden): Do you recall how Mr. Wilson held himself out at the time he was negotiat-

(Testimony of Elmer Bankus.)

ing with you on this particular transaction in respect to Mr. Agnew?

Mr. Duffy: Excuse me. I don't wish to continue making objections, but we would also like to record the objection that this is an attempt to prove agency by the declaration of an agent. It is also the testimony of a deceased person, which [39] is not admissible except where it is against his pecuniary interest.

The Court: He may answer subject to the objection.

Q. (By Mr. Bowden): Do you recall how Mr. Wilson represented himself?

A. As agent for Sam Agnew.

Q. Did he at any time specify what the terms of that relationship were?

A. At one time two or three years before he consummated the deal he told me he was working on a 5 per cent basis.

Q. On a 5 per cent commission basis?

A. But that was two or three years—that was in '43. After that he made no comment as to his percentage, or anything like that.

Mr. Bowden: No further questions.

The Court: You may postpone your cross-examination until after you have examined those documents, if you wish.

Mr. Duffy: Thank you.

The Court: Take him off and put another witness on. You can examine it at recess.

(Witness withdrawn.) [40]

C. D. CUNNINGHAM

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowden:

Q. Mr. Cunningham, what is your profession?

A. Attorney-at-law.

Q. How long have you practiced that profession? A. 47 years.

Q. Where do you presently practice law?

A. Centralia, Washington.

Q. How long have you practiced in Centralia, Washington? A. 47 years.

Q. Have you ever represented Mr. Samuel Agnew? A. Yes, sir.

Q. How long have you represented him?

A. I represented him and his interests for 44 years.

Q. Were you his attorney or one of his attorneys in the proceedings referred to as the Del Norte County court proceedings? A. Yes, sir.

Q. And also the proceeding which was commenced in this court or was transferred to this District Court involving the Double O Lumber Company? A. Yes, sir. [41]

Q. Were you in attendance at the first day of testimony on November 10th, 1949, in Del Norte County? A. Yes, sir; I was there.

Q. Can you briefly recall to us the sequence of

(Testimony of C. D. Cunningham.)

events which occurred subsequent to the first day of trial as between Agnew and Wilson?

A. Well, prior to the trial there was some discussion concerning a settlement of their controversy, a settlement of all their litigation, but nothing was arrived at until—well, then the trial proceeded, as you have indicated. I have forgotten the date that you mentioned, but it proceeded and the testimony was taken, I think, for a part if not the whole of one day. Then the matter was adjourned by the Court, and it seems to me that the following day was Armistice Day, and they thought that a settlement might be perfected over the Armistice period.

Then my recollection is that after Armistice Day, Mr. Buffington of Gold Beach, who was associated as one of the attorneys for Mr. Agnew, became sick and the Court took another continuance for a day or two. It was during that period of time that they came to an agreement and settlement. Now that is my recollection of it. I think that is substantially correct. There was one day of testimony, I think, or practically a whole day, and I think Mr. Agnew was on the witness stand during all that time. [42]

Q. By reason of your representation of Mr. Agnew did he ever express to you a reason for concluding that litigation in the manner in which he did conclude it?

Mr. Duffy: We will have to object to what Mr. Agnew may have told him. Both the plaintiffs and the defendant have made an effort to subpoena Mr.

(Testimony of C. D. Cunningham.)

Agnew, but he is not here. We will object to what Mr. Agnew may have told Mr. Cunningham.

The Court: He may answer subject to the objection.

The Witness: Just what was your question, please?

(Last question read.)

A. Well, the only reason that I know of was simply it was a way to settle a piece of litigation. That was all there was to it.

Q. (By Mr. Bowden): Did you ever prepare a partnership agreement, written partnership agreement, between Mr. Sam Agnew and Mr. Jack Weir, and others, on or about the year 1946?

A. Yes, sir; I did.

Q. Did you, as attorney for Mr. Sam Agnew, ever prepare a written partnership agreement between Mr. Agnew and Mr. Wilson?

A. No, sir.

Mr. Bowden: No further questions.

The Court: You may defer cross-examination. Call another witness.

(Witness withdrawn.) [43]

JACK WEIR

was produced as a witness in behalf of Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowden:

Q. Mr. Weir, where do you reside?

A. Centralia, Washington.

Q. What is your occupation?

A. Office Manager and bookkeeper of S. A. Agnew Lumber Company.

Q. For the S. A. Agnew Lumber Company?

A. Three different companies.

Q. How long have you held that position?

A. Since March 21, 1908.

Q. What year, please? A. 1908.

Q. Are you in charge of the accounting records?

A. Yes.

Q. For these particular operations?

A. That is right.

Q. Are you the Mr. Weir who entered into a written partnership agreement with Mr. Agnew and others in or around the year 1946? A. Yes.

Q. Has an entry on your books and records come to your attention [44] recently involving an item of \$100,000, an entry of about January 1 of 1945?

A. Yes.

Q. Do you recall what those entries were?

A. As I recall it, it was ten drafts of \$10,000 each.

(Testimony of Jack Weir.)

Q. Do you recall how those were reflected on your books and records?

A. Well, at the time I put them on as accounts payable, but that could have been a misunderstanding at the time. I didn't know just exactly how to handle it, and Mr. Agnew didn't know just what to do about it, and so I just entered them up as notes payable at that time.

Q. The original entry on your books and records, then, would be a credit to notes payable and a debit to cash?

A. That is right.

Q. Do you recall the explanation that you reported on those records and books of that entry?

A. Well, there was not much of an explanation to it, other than just a cash entry.

Q. Was there a notation to the effect that this was ten \$10,000 2½ per cent notes payable or maturing in one year?

A. That is right. As I recall it now, that was the way it was, yes.

Q. And you believe that there actually had been ten \$10,000 drafts? [45]

A. As I remember it, they were drafts, yes.

Q. Do you recall the disposition of the notes payable account? What was the subsequent entry?

A. Well, when the whole case was settled, that was credited back to the timber account.

Q. You closed out the notes payable account?

A. Yes.

Q. And credited it to the timber account?

A. Timber account. There were so many differ-

(Testimony of Jack Weir.)

ent timber deals involved that that was the final entry on the books.

Mr. Bowden: No further questions.

Cross-Examination

By Mr. Duffy:

Q. Mr. Weir, the entries to which you now make reference consisted of an entry in the notes payable account of S. A. Agnew Lumber Company on January 24, 1945, entitled Bank of America, S. J. Wilson, ten \$10,000 notes, \$100,000. Is that correct?

A. Yes, sir.

Q. Is it also correct that on December 31, 1950, you credited the notes payable account and debited the timber account for \$100,000; is that correct?

A. On what date was that?

Q. The entry was made as of December 31, 1950. That was [46] after the settlement of the Agnew-Wilson litigation.

A. The notes payable, as I recall, was charged and the timber account credited at that time.

Q. Yes, that is right. The \$100,000 was taken out of notes payable.

A. It was written off, yes.

Q. Now, I will ask you whether Mr. T. E. Williams, the Revenue Agent sitting here at the table, and Mr. William Holm, a certified public accountant representing plaintiffs, recently visited your office to look at these entries?

A. Yes, they did some time ago.

(Testimony of Jack Weir.)

Q. I will ask you whether at that time you did not advise both of them that you had no explanation for these items in the S. A. Agnew books?

A. I don't remember the exact words, but I just told them the plain facts the way it was handled, and that is about all I could do.

Q. Were these entries made in here at the request of Mr. Agnew?

A. Well, Mr. Stoneworth handled our accounts. He is a certified public accountant in Seattle. I guess it was between him and Mr. Agnew.

Q. Now, on the same date, January 24, 1945, when the notes payable account first shows these ten \$10,000 notes, Bank of America, S. J. Wilson, the books of S. A. Agnew Lumber Company [47] also show a deposit of \$100,000 in the cash account on that same date; is that correct?

A. What date was that?

Q. January 24, 1945. That was the same date as the entry was made in the notes payable account.

A. Yes, that would be the same time.

Mr. Duffy: That is all.

Mr. Bowden: That is all.

(Witness excused.)

(Short recess.)

Mr. Bowden: Recall Mr. Cunningham.

Mr. Duffy: Insofar as the plaintiffs are concerned it will not be necessary to recall Mr. Cunningham. We have no cross-examination.

The Court: That is all, I guess, Mr. Cunningham. They say they don't want to question you.

Mr. Bowden: Your Honor, may I call him for additional testimony on direct, please?

The Court: Oh, yes. [48]

C. D. CUNNINGHAM

a witness produced in behalf of Defendant, resumed the stand and was further examined and testified as follows:

Direct Examination

By Mr. Bowden:

Q. Do you recall the testimony that you gave a few moments ago, Mr. Cunningham?

A. Yes.

Q. Would you recall, please, the events that took place in the settlement of the Wilson-Agnew litigation once again, please, and specifically would you recall what your advice as an attorney was to Mr. Agnew in arriving at that settlement and the basis that you suggested to Mr. Agnew upon which the settlement could be arrived at?

Mr. Duffy: The plaintiffs will object to any testimony to show the motives which actuated the parties in making a settlement of the litigation.

The Court: He may answer if he wishes to, subject to the objection. He may not want to disclose it.

The Witness: I, myself, of course, cannot waive the privilege.

The Court: I will permit you to claim privilege.

The Witness: Very well. Thank you, sir.

(Testimony of C. D. Cunningham.)

The Court: He claims the privilege.

The Witness: I beg your Honor's pardon. [49]

The Court: He is claiming the privilege of attorney and client.

The Witness: I haven't claimed it.

The Court: Oh, you haven't?

The Witness: No.

The Court: Answer it if you want to.

The Witness: What actually occurred was during the course of the proceedings down there when we were attempting to arrive at a settlement of the whole controversy, not only the litigation there but litigation pending in this court and I think in the courts of Curry County, Oregon, we ascertained how much of the timberlands Mr. Wilson wanted in the way of settlement and how much Mr. Agnew had paid for those timberlands. That was determined, and it amounted to approximately \$75,000, is my recollection of it; not what the timberlands were worth, but what Mr. Agnew had paid for these timberlands. When we arrived at that conclusion of what they were worth—or what Mr. Agnew had paid for them, then we proceeded to settle the controversy by entering into an order or stipulation wherein Mr. Agnew was to convey by quitclaim deed to Mr. Wilson the amount which Mr. Wilson got, and Mr. Wilson conveyed to Mr. Agnew the other lands. Now that was how the settlement was arrived at.

Q. In arriving at that settlement, was any con-

(Testimony of C. D. Cunningham.)

sideration given to what the services of Mr. Wilson had been worth to Mr. Agnew? [50]

A. There was a letter here some place—we had it at that time, and perhaps you have it in the file—wherein Mr. Wilson, as I recollect it, had written Mr. Agnew a letter, and among other things he said he had been working for Mr. Agnew and in his interests for three years, and that he thought his services were worth \$150,000, or \$50,000 a year. And that was considered in making and accepting the settlement that was arrived at.

Mr. Bowden: Thank you, Mr. Cunningham. No further questions.

Cross-Examination

By Mr. Duffy:

Q. Mr. Cunningham, to refresh your recollection as to that letter from Mr. Wilson to Mr. Agnew, isn't it a fact that he stated that he had worked for three and a half years on this deal?

A. Oh, I think so. I think he did, Mr. Counsel. I think he did.

Mr. Duffy: I have no further questions.

Mr. Bowden: Thank you, very much.

(Witness excused.)

Mr. Bowden: The Government has no further witnesses, your Honor. [51]

Mr. Duffy: Excuse me, your Honor. Mr. Bankus was to be examined further on cross-examination. I believe he was excused temporarily.

ELMER BANKUS

was recalled as a witness in behalf of the Defendant and was further examined and testified as follows:

Cross-Examination

By Mr. Duffy:

Q. Mr. Bankus, I understand your testimony on direct examination was to the effect that Mr. Wilson had at one time stated to you that he was getting a 5 per cent commission on these transactions?

A. That is right.

Q. In order to get a commission he would have to be a real estate broker, would he not, if you know?

A. I suppose on timber. I am not familiar with the law on timber. I don't know how he was employed, whether he was on salary or not. I wouldn't know what his connection was, as far as how he was employed. On straight brokerage, I would think offhand yes.

Q. Are you aware of the fact that Mr. Wilson ever had a broker's license?

A. No, I am not.

Q. Did you pay any commission to Mr. [52] Wilson? A. Beg pardon?

Q. Did you pay any commission to Mr. Wilson?

A. No, I didn't. I paid George Dickinson, a broker.

Q. Excuse me?

A. I paid Mr. George Dickinson, a broker. George Dickinson was my broker. He handled it

(Testimony of Elmer Bankus.)

for me. He represented me in the sale, George Dickinson of Gold Beach.

Q. Was Mr. Wilson attempting to negotiate this sale? What was Mr. Wilson doing in this transaction?

A. Well, I met him through George Dickinson. I met Wilson through George Dickinson, so it was no concern of mine as to whether he had a broker's license. I was dealing with George Dickinson, who did have a broker's license.

Q. What did Mr. Wilson do in this transaction?

A. Well, he was representing Mr. Agnew, so he told Mr. Dickinson and me.

Mr. Duffy: That is all.

(Witness excused.)

Mr. Bowden: Your Honor, I would like to move the admission of Government's Exhibit W, which has been marked for identification.

The Court: Is that a new exhibit?

Mr. Bowden: Yes, your Honor.

The Court: Admitted on the same terms as the others. [53]

Mr. Duffy: The plaintiffs, for the record, would like to object to the admission of this exhibit upon the grounds previously stated as to the testimony of Mr. Bankus on the same subject.

The Court: Admitted, subject to the objection.

(The Escrow Agreement referred to, having been previously marked for identification, was received in evidence as Defendant's Exhibit W.)

The Court: Rebuttal, Gentlemen. The Government has rested.

Mr. Davidson: We would like to recall Mr. Newhouse for a few questions. [54]

S. O. NEWHOUSE

was recalled as a witness in behalf of Plaintiffs, in Rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Mr. Newhouse, did you hear the testimony of Mr. Wakeman on the stand here? A. Yes.

Q. A question has arisen in connection with his testimony as to how many sales of fir timber were made in Curry County in the year 1949. Will you tell me from your records how many sales you personally handled in the year 1949 in the general vicinity of any of the Wilson timber?

A. This list I have here was made out from my records. I don't have the exact dates the sales were made, but, as nearly as I can tell, during the years '48 and '49 there was no particular difference in the values of timber. In other words, during 1949 there was very little timber changed hands. I have eight of them here listed.

Q. Will you read off the prices at which each of those eight sales was made?

A. You want just the prices or the companies——

Q. Just the prices of each of them.

(Testimony of S. O. Newhouse.)

A. \$3.25, \$2.00, \$3.00, \$1.30, \$2.90, \$2.00, \$2.00 and \$3.80.

Q. Now, with reference to distance, which would be the farthest [55] of these sales from the location of the Wilson timber?

A. I don't think any of them would be as much as 15 miles.

Q. Were there other sales in the county by you in the same year that you did not pick up in this list?

A. Yes. I didn't list those that I didn't consider comparable.

Mr. Davidson: That is all. Thank you.

Cross-Examination

By Mr. Bowden:

Q. From your list can you tell me how many board feet you have recorded on those sales that you just mentioned?

A. You want the total or each sale?

Q. Just the total.

A. About forty-eight million feet.

Q. Forty-eight million feet? A. Yes.

Q. Total? A. Yes.

Q. On those sales did you represent the buyer or the seller?

A. In each case I represented the seller.

Mr. Bowden: No further questions.

Mr. Davidson: Nothing further.

(Witness excused.)

[Endorsed]: Filed November 16, 1955. [56]

PLAINTIFF'S EXHIBIT No. 4

In the Superior Court of the State of California
in and for the County of Del Norte

No. 4060

SAMUEL J. WILSON,

Plaintiff and Cross-Defendant,

vs.

SAMUEL A. AGNEW,

Defendant and Cross-Complainant.

Before: Honorable Samuel F. Finley.

Appearances:

For the Plaintiff:

C. E. H. MALOY,

WM. W. SPEER.

For the Defendant:

IRWIN QUINN,

C. D. CUNNINGHAM,

COLYER BUFFINGTON.

Thursday, November 10, 1949—10:30 A.M.

The Court: This morning, we have Samuel Wilson vs. Samuel Agnew, No. 4060, and also the cases that were to be tried at the same time. There were three cases, I believe. There were to be.

Mr. Speer: They were Agnew vs. Wilson, No.

Plaintiffs' Exhibit No. 4—(Continued)

3801, and Agnew vs. Wilson, No. 4061. I think that is all.

Mr. Quinn: And this case is Wilson vs. Agnew.

Mr. Speer: And the present one is 4060.

The Court: Then there are two: 4060 and 3801 and 4061—three of them.

Now, that is the understanding among all counsel, that these are to be consolidated for trial?

Mr. Speer: That is right.

Mr. Quinn: Yes.

The Court: Let the record show that that has been stipulated.

Mr. Speer: I might state that 3801 consists of a complaint and answer, and 4060 consists of complaint and cross-complaint, and 4061 consists of a complaint and answer.

The Court: I want to get the cases straight. It has been stipulated by counsel, then, pursuant to the conference we have just had, that Mr. and Mrs. Quayle may be appointed and act as official court reporters for the purpose of this trial. Now, that is agreed to by everyone? [1*]

Counsel: Yes.

The Court: You stipulate, then, that they act in place and stead of the official court reporter for Del Norte County, who is Miss Margaret Duffy?

Counsel: Yes.

The Court: The clerk will give the oath for both reporters.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiffs' Exhibit No. 4—(Continued)

(Thereupon, Mr. and Mrs. Quayle were duly sworn as official reporters for the case.)

The Court: All right, counsel, you may proceed.

Mr. Speer: On behalf of the Plaintiff, Mr. Wilson, we wish to move for leave to file an amendment to the complaint in case No. 4060. I might say that the amendment merely adds three parcels of land or property to the exhibit, and does not change the issues in the least.

The Court: Three parcels of property to Exhibit A?

Mr. Speer: Yes, in 4060.

Mr. Quinn: Before agreeing to that would you kindly indicate to us what tracts of timber they are?

Mr. Speer: Well, the first parcel mentioned on the amendment to the exhibit is in Humboldt County, and the one listed under "private" land. Other than that, I can't further identify it. It is a one-sixth undivided interest in the section——

Mr. Quinn: That is sufficient.

Mr. Speer: Then the second parcel listed in [2] amendment to Exhibit A under tax title land, was purchased from Trinity County at a tax sale. It consists in three quarters in three different sections.

The third parcel which is listed under tax title land is land that was acquired from the Evans Products Company in exchange for certain cedar

Plaintiffs' Exhibit No. 4—(Continued)

at the time of the original tax sale on or about the first of September, 1943, I believe.

Mr. Quinn: That isn't Section 36, though, is it?

Mr. Speer: No, sir.

We have have leave to file that amendment? To the Exhibit A?

The Court: If there is no objection, it will be permitted. You have the written amendment?

Mr. Speer: Yes, I presented it to the clerk.

The Court: Then, pursuant to the request of counsel, the written amendment just handed to the clerk will be considered as an amendment to the complaint, to Exhibit A to the amended complaint.

Mr. Quinn: At this time, may it please the Court, I would like to have Mr. C. D. Cunningham, an attorney of the State of Washington, at Centralia, entered as attorney in this matter by courtesy.

And also Mr. Colyer Buffington of Gold Beach, Curry County.

The Court: Very well. Let the record show that Mr. Irwin Quinn, attorney of record in California, has asked [3] the association of Mr. C. D. Cunningham of the State of Washington, and Mr. Buffington, of the State of Oregon; and inasmuch as they are being associated with local counsel, that motion will be granted, and will be associated counsel in the action.

Mr. Cunningham, what is your address?

Mr. Cunningham: Centralia.

The Court: And, Mr. Buffington, yours is Gold Beach?

Plaintiffs' Exhibit No. 4—(Continued)

Mr. Buffington: Gold Beach.

The Court: Are there any more preliminaries? If not, you may proceed with the case, Mr. Maloy.

Mr. Maloy: Of course your Honor is familiar with the pleadings under which Mr. Wilson is suing in 4060, for the purpose of establishing a joint venture and an interest in certain timber lands in Oregon and California by virtue of the terms and conditions of that joint venture.

I think, however, in order that the Court may more closely follow, and possibly better appreciate the testimony as it goes in—which probably will be quite voluminous on the part of Mr. Wilson, I will make a statement of what the Plaintiff seeks to prove.

I will go back to where Plaintiff and Defendant first met in Centralia, Washington, in the year 1943, I believe it was, in either April or May, 1943.

At that time, Mr. Wilson had been in the timber business down in South Western Oregon, for some period of time— [4] I believe commencing in '41 or '42, and had been dealing and negotiating in timber, and had obtained an option on the two pieces of timber. One is known as the Phillips Tract, and the other piece is known as the Lobster Creek Tract.

He had been negotiating with a group of individuals at Chehalis, Washington, for some period of time. A group was formed which took an option on these two parcels of timber. The option was in existence at the time that Mr. Wilson first met Mr.

Plaintiffs' Exhibit No. 4—(Continued)

Agnew, I believe that he was introduced by a man by the name of Anderson, who has since passed away.

Mr. Wilson advised Mr. Agnew of the fact that an option on these two tracts of timber, that he had an option. He advised Mr. Agnew, also, that the option had not been exercised, but the time for the exercise of the option had not expired.

He further advised Mr. Agnew that if the option was not taken up by what is known as the Chehalis Group that he would make a deal with Mr. Agnew, Mr. Agnew apparently being interested in the timber. Some time, either the latter part of April or the early part of May, Mr. Agnew gave to Mr. Wilson a check or draft, I don't remember which, for thirty-five thousand dollars, with which to pick up the option on it, I believe, or pay for the timber on the Phillips tract; and advised him that if the Chehalis Group did not pick up the option on those two tracts of timber, that he would make a deal with Mr. Agnew whereby for the thirty-five thousand dollars, [5] and eighty-eight hundred more, that the two tracts of timber could be had, and be taken in Mr. Agnew's name; and that he would, in effect, waive the profit which he had—that is, the difference between the price at which he had optioned the property to the Chehalis Group, and that which he had to pay for the timber; and that Mr. Agnew should retain the timber and they would sell it and split whatever profit they made over and above the forty-three thousand and eight hundred

Plaintiffs' Exhibit No. 4—(Continued)

dollars and any taxes or expenses that might have been accrued in the meantime.

And that agreement was accepted by Mr. Agnew.

Mr. Wilson, then, of course, used the thirty-five thousand dollars to encourage or persuade the Chehalis Group to promise to get busy on whether they were going to exercise the option. And they did exercise the option and took up the timber, and the thirty-five thousand-dollar draft or check was returned to Mr. Agnew.

In the same conversation, Mr. Agnew's attention was directed to the fact that there was a lot of county tax land in Curry County, Oregon, which it was possible to purchase. In other words, it was tax title land which the county had become owner of, and which Mr. Wilson had been working on with the view to getting the County Court—which, I believe, is the same as what is known as the county commissioners or supervisors in this State—to put up this timber for sale in large blocks so that it would be worth while for someone who wanted to build [6] a mill, or buy a mill in that district, to have timber with which to supply the mill for the sawing of timber into lumber. And that was discussed at the same time.

And it was also discussed at that time that this timber would probably be sold or purchased by a purchaser at different prices ranging from two to five dollars per acre.

And so there was some correspondence that will appear in evidence here, some letters written by

Plaintiffs' Exhibit No. 4—(Continued)

Mr. Wilson which was not answered by Mr. Agnew. But shortly thereafter Mr. Wilson was in Centralia many times while this was going on in the summer of 1943, and the parties agreed that Mr. Wilson would endeavor to get the timber put up in large blocks by Curry County, Oregon, at sale, and public sale, I believe. That the minimum price would be fixed, would endeavor to fix the minimum price of five dollars per acre, but would be classified according to the most inaccessible timber at two dollars an acre, and more accessible at three and four and the most accessible at five.

At the same time, there was discussed the matter of a mill. Now, at Port Orford, Oregon, at that time, there was a mill being operated by some people. I believe most of them were living in San Francisco. Operated by a corporation. They were in more or less financial difficulties. There was a large mortgage on the mill, and in these first conversations had at Centralia that were relative to the acquiring of the timber in Oregon and acquiring the mill at the same time, this [7] Port Orford mill was discussed.

And, from then on and during the summer of 1943 and the fall of 1943, and, as a matter of fact, for some considerable period, Mr. Wilson was very busy negotiating with the owners of the mill and, finally, with the mortgagee who held the mortgage on the mill, and endeavored to acquire title to the same.

At the same time, Mr. Wilson offered as an in-

Plaintiffs' Exhibit No. 4—(Continued)

ducement to Mr. Agnew the suggestion that he would secure the other timber, privately owned timber, so that he would have a nucleus in addition to the tax title timber for the operation of the mill if they were able to acquire it.

In August, 1943, a large quantity, several townships of tax timber, were offered for sale. The sale, however, was blocked by Mr. Buffington representing some clients of his, and it did not go through, Mr. Buffington having raised some legal questions as to the validity of the sale. So, because of that, Mr. Wilson employed a gentleman by the name of John C. Kendall, former judge of the court there in Oregon, to come down to Gold Beach and advise him and consult with the Court and the District Attorney, with a view of getting this timber, which the county owned and which it held for many years for delinquent taxes or non-payment of taxes, put up for sale in a legal manner.

And as I understand the facts, and I think the evidence will show it, there were conferences. And we have Judge Kendall's deposition, and he will tell you all about it, as will Mr. Wilson. [8]

And finally upon there having been numerous conversations and consultations and I believe, if my memory serves me right, Mr. Buffington participated in some of those conversations, the timber was put up for sale.

Going back to the first sale, Mr. Wilson put up his own, some fifty-six hundred dollars, paid over

Plaintiffs' Exhibit No. 4—(Continued)

to the county treasurer in August, and that was refunded to him.

And, on the second sale, Mr. Wilson did buy the timber in pursuance to an agreement that he had with Mr. Agnew that he would bid the timber in for the two of them under their agreement that Mr. Agnew would hold the title to the timber until he was reimbursed, or when the timber was sold he was to be reimbursed for the money that he put up, and the taxes that he paid; and if they sold the timber, any profit that they made would be divided fifty-fifty.

At the sale that took place, later in September of 1943, Mr. Wilson bid the timber in, and also paid another check or draft he had representing the sale, fifty-six hundred eighty-three dollars and some odd cents, to the county treasurer, along with some other money represented by check or draft that he obtained from Mr. Agnew.

And the title to the timber, most of it, was taken in the name of Mr. Agnew. However, there was one piece of timber taken in Mr. Wilson's name so that he could make a deal with another company known as the Evans Products Company, the details of which I won't go into now. [9]

All during the spring and summer of 1943, Mr. Wilson had been working on this matter with the County Court and the Commissioners, with the view of having the timber put up for sale. He received no compensation from Mr. Agnew at any time for the services. He paid his own expenses in connec-

Plaintiffs' Exhibit No. 4—(Continued)

tion with the matter; and, in fact, all during the time that the joint venture continued, which continued down to and until they ceased doing business in 1947, Mr. Wilson put up his money, paid his expenses for operating, his expenses for two or three automobiles which were worn out in rendering this service. He worked for no one else. He did no other work for anyone else with regard to the acquiring of timber and other tax title timber, which was purchased in Curry County under the same arrangement.

The tax title timber was also acquired in the State of California, I believe in Trinity County, and possibly in Del Norte and Humboldt Counties.

Now, during the course of that dealing together, timber was acquired from private owners. It seems that there was a good deal of timber, in Oregon, for instance, that had large amounts of delinquent taxes. One tract was known as the Bankus Tract, which your Honor will hear a good deal about. I believe the delinquent taxes were some thirty odd thousand dollars. That tract was acquired.

Other tracts were acquired. Privately-owned timber was acquired in the State of California. And during the course [10] of these dealings, Mr. Agnew and Mr. Wilson came to an agreement that on the privately-owned timber Mr. Wilson was to have a twenty per cent interest therein instead of the fifty per cent that he had in the tax title timber; and that when the timber was sold—and, of course, it was all bought for the only purpose of resale—at

Plaintiffs' Exhibit No. 4—(Continued)

a profit—that he should have the twenty per cent interest in the profit. Mr. Agnew should put up the money and that he should be reimbursed for the money that he put up and any taxes or other expenses that he was compelled to disburse in the carrying of the timber until it was sold.

Now, this arrangement continued, as I say, down to about 1947.

Along in the early part of '46, timber had become immensely valuable compared to what it was when it was acquired. As an illustration, I might cite the fact that some of this Curry County tax title timber was acquired in terms of timber for twenty-five or thirty cents per thousand, and in 1946 such timber had become worth four or five dollars a thousand.

At that time, Mr. Agnew began to cool off and become, shall I say, "cagey" or evasive. Mr. Wilson was urging and had been urging for some time in '45 and '46 that some of this timber be sold, and that it be liquidated, and that they take a profit. But Mr. Agnew was never willing to sell any timber.

So, along in the spring of '46, the relationship between these parties became more strained, and as time went on it became more strained until, finally, Mr. Agnew advised Mr. Wilson [11] that he had no interest whatsoever in any of the timber, or in any of the profit that might be obtained by the sale of the timber, and that he was, in fact, out. In fact I believe that Mr. Agnew stated he must have been out of his mind when he made any claim,

Plaintiffs' Exhibit No. 4—(Continued)

although during all that period of time Mr. Wilson had not received one cent of compensation from Mr. Agnew and had not been reimbursed for his expenses. And Mr. Wilson had worked for no one else or earned any money in any other timber deal except as to that pertaining to the joint venture which is alleged in the complaint and which we expect to prove to your Honor.

I think that brings us down to the time that Mr. Agnew first commenced suit over a tract of timber which is involved in one of these lawsuits here known as the Gilbert Thorp Tract.

On that suit being commenced, your Honor will recall that Mr. Speer, then representing Mr. Wilson alone, filed a counterclaim or cross-complaint about which there was considerable discussion; and later on it was determined that the safest thing to do would be to start the suit of Wilson vs. Agnew to establish the joint venture, which is the main suit that is involved here, under the number 4060.

Mr. Speer suggested that for your information I might explain that there are really three classes of timber involved in this lawsuit. There is the tax title timber in these various counties: Curry County, Oregon; Humboldt and Trinity and [12] Del Norte Counties in California.

Then, there is the title acquired from private owners. And I might say to your Honor that that acquired from private owners was acquired very cheaply. Mr. Wilson negotiated for months. In one case, I remember that he negotiated for over a

Plaintiffs' Exhibit No. 4—(Continued)

year endeavoring to get this privately-owned timber at an advantageous price. Timber since then has increased enormously in value. Some tracts, I believe, that he paid fifteen thousand dollars for, have increased to a value of two or three hundred thousand dollars.

And I point that out to your Honor because it, of course, establishes a motive of conduct for the Defendant in this action.

Then, there is the timber acquired from private owners, but acquired for the Port Orford Mill and to serve as a nucleus of timber to supply that mill if they got it through mortgage foreclosure, which was later on commenced, or through negotiations with the owners of that company, and to supply that mill with timber to be sawed into lumber, and a few tracts Mr. Wilson claims no interest in because it was acquired to induce Mr. Agnew to invest some fifty thousand dollars in the buying of the mortgage on the Port Orford Mill which was subsequently foreclosed.

But shortly before the sheriff's sales the Port Orford Mill Company went into bankruptcy under 77b down in San Francisco, and then later reorganized themselves in such a [13] way and got a loan from one of the government agencies in a sufficient sum to redeem and pay off the mortgage. So they didn't get the mill.

However, Mr. Agnew still has the timber, all of which has likewise greatly increased in value over the price for which Mr. Wilson obtained it.

Plaintiffs' Exhibit No. 4—(Continued)

And in all these transactions, let me say, your Honor, Mr. Agnew did not have anything to do with them. He didn't participate in any of them. He supplied Mr. Wilson with money, entrusted Mr. Wilson with large sums of money with which to buy this timber. Some went through escrow.

In any event, all of the negotiations over a period of months on that privately-owned timber was done by Mr. Wilson and without any compensation from Mr. Agnew therefor and at Mr. Wilson's expense.

I think that that gives you an outline of the history of the transactions between these two parties, your Honor. [14]

Mr. Irwin T. Quinn: Shall we make a statement now, your Honor?

The Court: If you wish to make a statement, Counsel.

Mr. Quinn: I think maybe it would be helpful to the Court for us to put our position before you now so that you will know what the issues are.

Quite contrary to anything that Counsel has just stated, in the first place our position is that we never entered into—that Mr. Agnew never entered into any joint venture with Mr. Wilson as alleged in the complaint, or any other type of joint venture or partnership or association for the resale of timber, or for the division of profit of any timber so acquired upon the resale of the same.

Going back to the Phillips and Lobster tracts, I want to state to the Court that the position in

Plaintiffs' Exhibit No. 4—(Continued)

that, as far as it will enter into this picture here, as a background, Mr. Agnew was not informed by Mr. Wilson that he had that timber under option. He said he had it for sale to him. So far as the Curry County timber is concerned, Mr. Agnew investigated that by his own men; he was informed of the county properties down there in Curry County might possibly be put up for sale. And it is true that Mr. Wilson did do the actual bidding, but under the direction of Mr. Agnew who was there at the time advising him what to bid on each particular parcel of land. The position that Mr. Agnew will take in this is that so far as all these different pieces of [15] timber is concerned, the acquisition of each of them was an individual proposition in itself.

Mr. Wilson, if he had a piece of timber to sell that he could acquire from some private individual, he would come to Mr. Agnew and say to him: "I can acquire this piece of property"—say the Frick property—"here for so much money." Mr. Agnew would make his investigation; he would send his men out to look at the timber, and if the timber was all right after his own cruisers had looked it over, and the price was all right that Mr. Wilson quoted him, without any further ado, Mr. Agnew says, "All right, I will take that."

Now, Mr. Wilson—we will show in this that he wasn't working for nothing anywhere along the line; that he, in all of these private deals, or a great many of them, he made a sizable piece of money,

Plaintiffs' Exhibit No. 4—(Continued)

a commission. He would buy it for so much, as in the Frick deal, for twelve thousand five hundred dollars; he would turn around and sell it to Mr. Agnew for nineteen thousand five hundred dollars, thereby making six thousand or seven thousand dollars for himself.

And we will show that deal after separate deal that he did, Mr. Agnew gave him a great deal of money—some three hundred and fifty thousand dollars during the course of their dealings together. Now this sum, so far as we are able to ascertain at the present time, Mr. Wilson paid out something like three hundred and—two hundred and seventy-one thousand dollars for the timber. [16]

The Court: What was——

Mr. Quinn (Interposing): No, I mean a hundred and seventy-one thousand dollars for the timber.

The Court: One hundred and seventy-one thousand?

Mr. Quinn: Yes. We will show that in addition to that there were other monies which Mr. Wilson obtained—for instance, in the Evans deal which has been referred to here as a piece of timber that was taken out of the county timbers when they were bid on at Curry County, and in the deal that was made between Mr. Agnew and Mr. Wilson whereby they were trading, if you remember, on even-up terms supposedly, it was discovered after that Mr. Wilson received six thousand dollars in cash from that county.

Plaintiffs' Exhibit No. 4—(Continued)

We will show that in the monies that exchanged hands up at Curry County that there was a refund of twenty-two hundred and seventy-five dollars—something like that—to Mr. Wilson. So, he has obtained in this large sums of money during these years. He hasn't done this for nothing. He did obtain a fair commission and fee on it at the time which was adequate, and the thing that I want to present was that so far as Mr. Agnew and Mr. Wilson's situation was concerned, never, at any time, was there any arrangement about a joint venture. There is nothing in writing about it. Whatever took place between these men was verbal. That Wilson didn't devote all of his time during those years to Mr. Agnew, nor, so far as Mr. Agnew was concerned, was it intended that he [17] should, and he attempted to sell timber lands to others.

We will show that in this complaint for some reason or other there has been a great deal of timber that isn't included, some eighty-eight hundred acres or more, and that is the private deal that they refer to here of the Reed, the Rutherford deal and a number of others where each—in each one of them, we will show that Mr. Wilson made a large amount of money.

And in this there are two propositions I want particularly to call the Court's attention to at this time. It is practically admitted in this case that Mr. Wilson now has some eighty-four thousand dollars of Mr. Agnew's money which Mr. Agnew gave him and which is admitted; twenty thousand eight

Plaintiffs' Exhibit No. 4—(Continued)

hundred dollars to buy what was called the Thorpe timber, which he took title to in his own name and still has title to, which is covered by the first action, 3801.

And there is the sum of twenty-five thousand dollars cash given in a check by Mr. Agnew to Mr. Wilson to purchase what is known as the Power Deal, to be used as earnest money on the purchase of quite a tract of timber. Mr. Wilson got the check; never returned it. Then there is the Lauff deal. Yes, the Power deal fell through. Then there is the Lauff deal. That is admitted, and Wilson's own position that he owes Mr. Lauff on that twenty-nine thousand and some odd dollars. Part of it came out of the twenty-six thousand-dollar draft that was given to Mr. Wilson for the purchase of Trinity County timber. [18]

However, there was some ten thousand dollars of that used in the Trinity County timber, but the balance of nineteen thousand or so evidently went into the Lauff Hotel, together with other monies that we can trace in it.

Then, in all these private deals, and there is ten or twelve of them, we figure that he has received thirty-five or forty thousand dollars in addition to the money that he has there. And we will show by draft and checks exactly the amount of money he got. The most accurate figure is three hundred and ten thousand six hundred and forty-six dollars. We will show by checks and drafts: Thirty-seven thousand in cash that was paid, and in addition to those

Plaintiffs' Exhibit No. 4—(Continued)

amounts, Mr. Agnew paid large drafts to others direct, as in the Curry County deal when he paid in two drafts—one in forty thousand and one in the sum of fifty-seven thousand dollars. Of course, added to all of that comes your taxes and other things, but I don't think that applies at this time. I don't think it has anything to do with this question of joint venture nor the increase in value. The valuation of that—that is probably true as far as that is concerned, but apparently they stress that because the timber has increased in value and that they are entitled to participate in it. Of course that has nothing whatsoever to do from the legal proposition of proving joint venture which we absolutely deny, and there was none that ever existed and the facts will prove that.

The Court: All right. [19]

Mr. Quinn: Do you want to know which order we want to take this up in?

The Court: What do you mean? Do you mean all three of these?

Mr. Buffington: The question is, your Honor, a little uncertain in our minds, I think. These three cases are consolidated for trial, and one of them, no, in two of them we are the plaintiffs. The other side is the plaintiff in the other. Now, the question which arises is the order of proof.

Mr. Quinn: If it is by majority, well, we have two.

The Court: I didn't know there was any con-

Plaintiffs' Exhibit No. 4—(Continued)

troversy on that. I believe the principal case is No. 4060.

Mr. Maloy: May I ask this: Without any consolidation of these cases, I think they would automatically be disposed of in 4060, because as a first and second cross-complaint in No. 4060 they have pleaded these matters which are involved in the other two actions. So, I believe, 4060 is the main case, and that is the case that should be heard first, and, as a matter of fact, in the hearing of that case, and the evidence of that case you will hear all of the evidence in regard to these other transactions. They come in automatically.

Mr. Buffington: I don't think there is any controversy. We are agreeable that they have the opening if they wish.

Mr. Quinn: We will agree to that.

The Court: All right. You may proceed.

Mr. Maloy: We will call Mr. Agnew. [20]

MR. SAMUEL A. AGNEW

called as a witness under Section 2055 of the Code of Civil Procedure, after being duly sworn, testified as follows:

Cross-Examination

By Mr. C. E. H. Maloy, Counsel for Plaintiff:

Mr. Maloy: If it please, your Honor, we are calling Mr. Agnew under Section 2055 of the Code of Civil Procedure.

Q. What is your name, please?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

A. Samuel A. Agnew.

Q. Where do you live?

A. Centralia, Washington.

Q. How long have you lived there?

A. Most of my life.

Q. What business have you been engaged in while you were in Centralia, Washington?

A. Manufacturing lumber.

Q. Have you been engaged in the buying and selling of timber? A. No, sir.

Q. Have you bought any timber for your lumber manufacturing at Centralia? A. Yes, sir.

Q. Well, then, you have been engaged in buying of timber, haven't you? [21]

A. Buying of timber, yes, sir.

Q. Are you acquainted with one, or were you acquainted with one by the name of O. E. Anderson? A. Yes, sir.

Q. Where did he live?

A. At Chehalis, Washington, I believe.

Q. You are acquainted with Mr. Samuel J. Wilson, the plaintiff? A. Yes, sir.

Q. How did you happen to meet Mr. Wilson?

A. Mr. Anderson brought him to our office.

Q. When was that, Mr. Agnew?

A. Well, I would think, April of 1943. I am not sure.

Q. What part of April, 1943?

A. Well, I couldn't say.

Q. Do you recall if it was the early part or

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

latter part of April? A. I couldn't say.

Q. What—did you and Mr. Wilson on that occasion have any conversation about timber?

A. Yes, sir.

Q. What timber at that time did you discuss? Timber known as the——

A. (Interposing): Timber known as the Phillips tract.

Q. And where was the timber known as the Phillips tract located? A. Near Gold Beach.

Q. That is Gold Beach—— [22]

A. (Interposing): Gold Beach, Oregon.

Q. Oregon. And did you at the same time discuss a tract known as the Lobster Creek Tract?

A. I don't remember whether it was the first time—whether it was at that time or later.

Q. Where did this discussion take place, this first time you met Mr. Wilson?

A. In the office at Centralia.

Q. Your office? A. Yes, sir.

Q. And how long did it take?

A. The office of the Eastern Railway Lumber Company.

Q. Very well. How long did it take?

A. Well, I couldn't say.

Q. Well, were you there an hour together, two hours, or what? A. Well, possibly an hour.

Q. And did you arrive at any agreement of any kind at the time with Mr. Wilson? A. No, sir.

Q. When did you see Mr. Wilson the next time?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

A. I don't remember. It was some time after that. I don't remember just when it was.

Q. Well, in the first discussion did Mr. Wilson tell you about the Phillips tract? A. Yes, sir.

Q. Did he tell you about how much timber it had on it, and the [23] character of timber, and accessibility or lack of that?

A. I don't think there was any mention made of the quantity of timber, but it was acres that was talked then.

Q. Well, was there no discussion about the amount of timber per acre that was located on the Phillips tract?

A. Not that I remember at all.

Q. Did you give him a check or draft for thirty-five thousand dollars on that day?

A. No, sir.

Q. Well, now, then, how long after that was it that you saw him the next time?

A. Why, I don't remember. Probably a couple of weeks.

Q. Did he advise you in the first conversation that the Phillips tract was under option to anyone?

A. No, sir.

Q. He didn't tell you it was under option to a group known as the Chehalis Group?

A. No, sir.

Q. Well, in the second conversation, which you say was a couple of weeks later, what did you talk about then?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. I think at that time he said that if the Phillips tract suited us——

Mr. Maloy: I can't hear you.

A. (Continuing): ——that if the Phillips tract didn't suit us he also had a tract known as the Lobster Creek tract, and he wanted to know if we would go down and look at it. [24]

Q. Had you gone and looked at the Phillips tract up to that time? A. I don't think so.

Q. Well, all right, what else did he say, if anything, about the Lobster Creek tract?

A. Well, he said the price on the Lobster Creek tract was fifty thousand dollars. He would sell it for fifty thousand dollars.

Q. Did he tell you—did he offer you the Phillips Creek tract in the second conversation?

A. Well, I don't remember which conversation it was, but he offered both.

Q. Did he offer the Phillips Creek tract in the first conversation? A. Yes.

Q. And at what price did he offer it to you?

A. Thirty-five thousand dollars.

Q. Did he discuss with you at that time what the price he was purchasing, or had the timber option for?

A. No. He just said that he would sell it free of all encumbrances for thirty-five thousand dollars.

Q. And he would sell the Lobster Creek tract

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

clear of all encumbrances for fifty thousand dollars, is that correct? A. Yes, sir.

Q. And was it at the second conversation that you had that you gave him the thirty-five thousand-dollar draft or check? [25]

A. No, we went down and looked at the first—I think we looked at the Phillips tract, and I think on a later trip we looked at Lobster Creek tract.

Q. When you say “we,” who do you mean by “we”?

A. Well, I think the first time was Mr. Sherwood and I, myself, and the second time there was Mr. Sherwood and Mr. Troxel and myself.

Q. Where is Mr. Troxel now?

A. Mr. Troxel is dead.

Q. I see. What else did you do when you went down and looked at the Phillips and Lobster Creek tract? Did you look at any other timber?

A. No, sir.

Q. You just went down to Curry County to look at that timber to see whether it was good timber and so forth?

A. Well, to see what our people wanted, whether they wanted it or not.

Q. Well, then, when you came back from that trip, after examining this timber, was it then that you gave him the thirty-five thousand dollars in the form of a check or draft?

A. I don't remember whether it was in regard to the trips. I don't remember just what trip it was.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. Well, it was after you had made a trip to Oregon, wasn't it? A. Yes, sir.

Q. Yes. Well, then, you saw him then again after you had first—you talked to him once in April and you talked to him once in [26] May, then you made the trip down to Oregon. Is that the way I get it?

A. Well, I wouldn't say whether it was April or May, or whether they were both in April, but we made two trips to Oregon and we looked at the Phillips tract on one of the trips and I think the Lobster Creek another trip.

Q. All right. Well, then, was it after the second trip that you gave him the thirty-five thousand dollars in the form of a check or draft?

A. It was after the second trip.

Q. After the second. And when was that, can you tell us?

A. No, I couldn't tell you just exactly.

Q. Well, was it in May of 1943?

A. I couldn't say.

Q. Was it in June of '43?

A. Well, I don't know. It might have been.

Q. Well, what is your recollection on it? Have you any recollection on it at all?

A. It was strung along, I would say, strung along through April and May, and the fore part of June.

Q. All right, now, what—pardon me?

A. The early part of June, I would say.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. What did you give him the thirty-five thousand-dollar check or draft—which was it, a check or draft? A. A check.

Q. When did you give him that? [27]

A. I don't remember what trip it was that he was there, but he came there and wanted to know if we were interested in the timber. He said he had had other prospects.

Q. Did he tell you that that was an option to the Chehalis Group?

A. Later he did. He didn't tell me that it was optioned until after I told him we would take it.

Q. He didn't tell you that until after you had told him that you would take it?

A. That we would take the Phillips tract.

Q. He never mentioned to you that it was under option to the Chehalis Group?

A. No, sir; he did just prior to my giving him the check.

Q. He told you that it was under option to the Chehalis Group then? A. Yes, sir.

Q. But you have no way of fixing the date that you gave him that check for thirty-five thousand dollars? A. I have not.

Q. Well, what was the thirty-five thousand dollars for?

A. The Lobster Creek tract—I mean, the Phillips tract.

Q. The Phillips tract? Did he agree with you

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

then that he would have transferred to you the Phillips tract?

A. No, sir. But he told me it was under option at that time, and suggested that I give him the check, and if they didn't exercise the option, why, we—why, then, he would turn the papers [28] over to us.

Q. And you found out later—you were advised later, weren't you, that they did exercise their option?

A. Yes. [29]

Q. Were you advised of that?

A. When Mr. Wilson came back.

Q. When was that?

A. I think it was the same day.

Q. Well, the same day in what month?

A. I couldn't say.

Q. In June or July?

A. I think it was either in May or June.

Q. May or June? A. Yes.

Q. And then what happened to the thirty-five thousand-dollar check?

A. I said: "Well, take the Lobster Creek Tract," and he said, "I am sorry, but that is also under option," and then I asked him to give me the check.

Q. Now, during this period of April, May and June that you were dickering and examining and talking about the Phillips Tract or the Lobster Creek Tract, was there any discussion between you and him regarding the proposition that if the

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Chehalis group did not exercise their option, that you would sell him the Phillips Tract or the Lobster Creek Tract at cost to him? A. No, sir.

Q. And no discussion at all with regard to your taking title to and entering into any kind of a deal in disposing of it and deriving profit? [30]

A. No, sir.

Q. Never any discussion to that effect?

A. No, sir.

Q. Was there any discussion at that time regarding the acquisition of any other property, timber, other than the Phillips Tract and the Lobster Creek Tract later?

A. Yes, after the first time when we looked at the Phillips Tract, and then, I think, it was the next trip we looked at the Lobster Creek tract.

Q. And that is what you went down there for at that time? A. Yes, sir.

Q. And that is the business that you transacted down there? That was the purpose of your going down there? A. Yes, sir.

Q. You didn't go down there for any other purpose whatsoever?

A. Well, any more than probably looking at the timber in general.

Q. You are familiar with the tract known as the Rutherford Tract? A. Yes, sir.

Q. You have title to that in your own name now, haven't you? A. Yes, sir.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. And that was acquired in the early part of '43, was it not?

A. I think August, 1943—September, rather, 1943.

Q. Did you look at that tract when you were down there at the time that you went to look at the Phillips tract, and the [31] Lobster Creek Tract?

A. No, sir.

Q. When did you first look at that Rutherford Tract? A. In August.

Q. Who called your attention to the possibility of acquiring the Rutherford Tract?

A. Mr. Wilson.

Q. When did he direct your attention to that? It must have been before August of 1943.

A. No, it was not before August. It was either August or early September, I am not sure which.

Q. Now, prior to that time, and in April, 1943, did Mr. Wilson talk to you about building a mill in Oregon, about your building a mill in Oregon?

A. Well, there was—he always had ideas about building mills. Just when it was, I don't know. The conversation was that the people that were buying the timber that owned the mill there, that first when that was cut out, the timber was cut out, that if they bought any quantity of timber in Oregon, that they would move the mill.

Q. What mill?

A. The one known as Western Cross, a manufacturing company.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. That was an old, old mill, forty years old?

A. That is right—well, I wouldn't think so.

Q. How old was it then?

A. Probably the concrete foundation had been there for some time, [32] but it was a modern mill.

Q. Was it a modern mill in 1943? A. Yes.

Q. Well, you had large bodies of timber to cut in Washington, didn't you? A. No, sir.

Q. Are you still operating that mill?

A. Yes, sir.

Q. Been operating it continuously since?

A. Well, nearly so, yes.

Q. You required timber to operate the mill, did you not? A. Yes, sir.

Q. And you had timber with which to operate the mill?

A. At the time that we started looking for timber in Oregon, the supply of timber for the mill adjacent to the mill didn't look very good, and it wasn't much, and it figured then about two years' run; and there was some other timber acquired, and it is still running.

Q. Now then, was the acquisition of any mill over in Oregon discussed between you and Mrs. Wilson in April of 1943, was it discussed by you in April of 1943?

A. I don't think that early, but there was discussion about the mill.

Q. Was it in May, 1943?

A. I couldn't say. It was in the summer of 1943.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. It was the early part of the summer wasn't it? [33] A. I think so.

Q. And he then told you about the Port Orford Mill? A. Yes, sir.

Q. And did he tell you about what he thought about the financial condition of that mill at that time?

A. Well, the first thing that come up was talking about things relating to buying the mill.

Q. Well, what mill, the Port Orford Mill?

A. The Port Orford Mill.

Mr. Quinn: At this time, may it please the Court, with regard to these mills—maybe this line of testimony has a place in the case according to their pleadings. There is only involved here the purchase and resale of timber lands. We are not objecting to it at this time, because it may have certain bearing on the whole case. It is not to be considered as any part of a joint venture.

The Court: I understand that. Go on.

Q. (By Mr. Maloy): Have you the impression in mind, did he tell you that about the financing of the company that owned the Port Orford Mill?

A. That was discussed later. Only I don't remember just when.

Q. How much later?

A. Well, I couldn't say.

Q. Was it discussed in the summer of 1943?

A. I think so.

Q. And was there anything said between you

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

and Mr. Wilson [34] as to why there was any advantage in acquiring that mill?

A. Well, the whole setup was that we weren't timber people, and our only purpose was buying the timber to remanufacture. And Mr. Wilson said the more mills "you have and the more lumber you manufacture, the more timber I will be able to sell you."

Q. The more timber he would be able to sell you. Well, just explain that a little bit. What do you mean? If you had a mill, you could buy timber more easily if you had a mill in the locality?

Mr. Quinn: I think those questions are argumentative.

The Court: Well, he has asked him to explain something which I will permit.

The Witness: He bought the timber. His idea, as I gather, was to sell us the timber to manufacture into lumber in the mill.

Q. He was going to sell you the timber?

A. That was the point of where he was selling us the timber.

Q. Was there any particular timber discussed that he was going to sell you, at that time you were talking about the Port Orford Mill?

A. Not to my recollection—

Q. I see. Well, now then—

Mr. Quinn: Let him finish the answer.

A. —presumably, about the timber adjacent to the mill?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. Did he tell you that? A. No. [35]

Q. He didn't tell you that?

A. No, that is what I was looking at, to see what was available and it never was worked out satisfactorily. We never purchased the mill.

Q. Is that what he told you? Did he tell you that that was the purpose of acquiring the mill, so as to acquire more timber? A. Yes.

Q. That is what he told you? A. Yes.

Q. When did he tell you that?

A. I couldn't say.

Q. Was it in July of 1943?

A. I couldn't say. It was while this discussion was going on.

Q. Was it in June? 1943?

A. I couldn't say.

Q. Well, it was in the early spring or summer.

A. In the summer, I will say about the summer.

Q. All right now. Prior to August, 1943, did you have any discussion with him regarding tax title land in Curry County, Oregon?

A. When?

Q. I say prior to August, 1943, did you have any discussion with Mr. Wilson, at any time or any place, with regard to acquiring tax title timber land in Curry County, Oregon?

A. After the Phillips Tract and the Lobster Creek Tract fell through, while we were down there we understood that the county [36] was going to put up timber land for sale; so when these two

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

pieces of timber fell through—the Lobster Creek and the Phillips Tract fell through—we went down and investigated the county timber.

Q. Who went down?

A. Mr. Sherwood and myself.

Q. Did Mr. Wilson go down, too?

A. No, sir.

Q. Mr. Wilson advised you. I asked you a little while ago, did Mr. Wilson advise you at any time prior to August, 1943, in regard to the possibility of acquiring tax title timber in Curry County, Oregon?

A. He advised me not to have anything to do with any tax timber in the State of Oregon.

Q. And when did that discussion come up?

A. The first time that he mentioned the county timber.

Q. When was that?

A. I would think the latter part of July.

Q. 1943? A. Yes, sir.

Q. Then, you did discuss with Mr. Wilson, at that time, Curry County tax title timber?

A. Mr. Wilson——

Q. Answer the question please. Did he or didn't he——

Mr. Quinn: He can answer that in his own way.

Q. (By Mr. Maloy): So, you said a minute ago [37] Mr. Agnew, that Mr. Wilson told you to lay off and leave the tax title timber alone. Now

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

I am asking you; you did discuss with Mr. Wilson the Curry County tax title timber?

A. As to the extent of his advice to leave it alone.

Q. What were you talking about? Is that all you said between you?

A. Mr. Wilson came up and said, "I understand you are fussing around with the county timber." And he said, "My advice is to leave it alone, lay off of it."

Q. When was that now?

A. July. We had been working on it for quite some time.

Q. How long had you been working on it?

A. Oh, probably a month or six weeks.

Q. Then, you started in May to work on the tax title timber in Curry County?

A. I don't know when it was. I don't think that we really went down and started checking timber, the county timber, until after the Phillips and Lobster Creek deals fell through.

Q. Then, you say, that was in June. So, in June you started to check up on the Curry County tax title property? A. I think so.

Q. What did you do with regard to checking it up?

A. Went on the ground and looked it over and at the point of accessibility of it or the nonaccessibility.

Q. Where did you find the legal description of

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

the land that was subject to sale or that was going to be sold? [38]

A. We got a Mesger map showing the ownership and what belonged to the county.

Q. How did you know the county was going to offer any particular tract for sale at that time?

A. I wouldn't say that we knew, but we understood that they were going to sell, and that they were arranging to get the timber land on the tax roll, and that they were going to offer it for sale.

Q. Who told you that—that they were going to offer it for sale?

A. We found it out at the court house. I don't remember who it was.

Q. You don't remember what officer. Did you talk to the sheriff or the tax collector?

A. Yes, well——

Q. Mr. Sabin, did you talk to him?

A. I talked to him, but I don't remember when it was, whether it was that time or not.

Q. Did you talk with Miss or Mrs. Walker, the County Clerk, with regard to it at that time?

A. I don't think so.

Q. Did you talk to any of the county clerks?

A. The first thing that we did, we spent most of the time looking at the timber.

Q. How did you find out what timber to look at?

A. The Mesger shows what the county owns. [39]

Q. How did you know the county was going to

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

offer any tax townships or tracts of timber for sale, at that time?

A. Well, I don't know that we knew exactly what it was, only we understood that they were going to offer practically all their holdings.

Q. All the holdings that Curry County owned?

A. That was the understanding, for taxes.

Q. So you and Mr. Sherwood went and looked at all the county holdings?

A. I wouldn't say we looked at all, but we looked at an awful lot of them.

Q. Have you any record of survey or cruise or anything that you made of any of the timber?

A. We did some checking, we didn't cruise it, we checked it.

Q. Have you any report right now, here in the courtroom, on the timber that you looked at prior to August, 1943, showing what you found on these various tracts or grounds that you looked at?

A. I think we have. I don't know just where they are.

Q. Will you please produce them?

Mr. Quinn: I object to this; you made no demand on him.

Mr. Maloy: I didn't know they had them. Now he says that he has got them. Let's see them.

The Court: I think the answer was that he didn't know whether he had them and he didn't know where they were. [40] The Court can make no order to produce under those circumstances. If

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

you will develop it a little bit further, and it appears that there is something the Court can order him to do, I will order him.

The Witness: The main part of it was my personal observation.

Q. (By Mr. Maloy): Was it your personal observation that you are relying on?

A. By whom?

Q. By yourself or Mr. Sherwood or anything else, on this particular timber that you looked at, and that they were going to offer for sale.

A. We were looking it over. I wasn't mapping it or making up a list for anybody else. I was looking it up for ourselves.

Q. Have you got the legal descriptions of any of the timber that you looked at prior to August, 1943?

A. Sure we have got them—I would think we would have.

Q. Did you talk with the county commissioners about the sale coming up in August, 1943?

A. I talked to one of them, I think it was Judge Boyce.

Q. He is dead, isn't he? A. I believe so.

Q. Is there anybody else you talked to among the county commissioners or the clerks?

A. I don't think so.

Q. Did you talk to the tax collector, Mr. Sabin, or the sheriff [41] prior to August, 1943, and prior to the first sale?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. No, I don't believe I did.

Q. Did you talk to Mrs. Walker, the County Treasurer, prior to the first sale of August, 1943?

Mr. Buffington: I don't believe that counsel intends to be misleading, but Mrs. Walker is not the county treasurer.

Mr. Maloy: I beg your pardon. Did you talk to Mrs. Walker, the County Clerk?

A. Regarding the timber sale?

Q. Yes. A. No, I did not.

Q. At the August sale?

A. No, I did not. I think the first that I knew of the timber that was going to be offered for sale, or supposed to be, was along the middle or maybe towards the latter part of July. It was in the paper, listed in the paper.

Q. What paper?

A. I forget the name of it, I don't know.

Q. Was that the notice of sale?

A. It was the notice of sale. It didn't include all the timber, but it included part of it.

Q. And you never talked to Mr. Wilson about any of this tax title timber prior to the August sale, except that he told you to leave it alone?

A. No, I didn't say that.

Q. What did you say, then? [42]

A. I said that the first time I talked to Mr. Wilson, he advised me to leave any tax timber in Oregon alone. That is for some reason about a nine-

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

year plan or something, that it wasn't legal and it wasn't worth the paper it was written on.

Q. The nine-year plan has reference to the payment of a certain percentage down, doesn't it?

A. I don't know.

Q. And so much per year?

A. I don't know the particulars of it.

Q. Well, before you went to look at this tax title timber in Curry County that was coming up for sale in August, 1943, did you make any inquiry of any county official as to the terms upon which it could be bought? A. No, no.

Q. Did you make any inquiry of any county official prior to August, 1943, in regard to the price at which the county would sell this large amount of timber that you and Mr. Sherwood examined?

A. The records show that they'd been selling timber and land and it was sold by the acre at different prices.

Q. What records are you speaking of?

A. Well, the county records as I got it. I didn't examine them as to sales, but certain ones stated that they had bought.

Q. Who stated that to you?

A. There was different ones.

Q. Name somebody, will you, that stated that to you prior to [43] August of 1943?

A. One of them was at the Calgrove Ranch. I don't remember who it was—that they bought some

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

county land. It seems to me like it was two or three dollars an acre.

Q. Was that timber land?

A. There was timber on it.

Q. Was it sold as timber land?

A. I couldn't say about that. I don't know as there was any distinction between timber land and brush, as far as I know.

Q. Did you make any inquiry of anybody prior to August, 1943? A. I done the most——

Q. As to whether it was timber land or not?

A. I done most of the investigating myself.

Q. Well, all right. Now, what other investigation did you make of the county timber land that was being offered or was going to come up for sale on August, 1943, other than that that you have described?

A. Well, that was all—in other words, we looked at enough so that we were satisfied that it was worth going into.

Q. How many acres did you look at?

A. I don't know. When you talk about looking at acres, you go across a section and make a run or two across it. You don't see it all; so when you ask what I looked at, that is indefinite.

Q. How many acres were going to be offered for sale?

A. I think around thirty-one or thirty-two thousand acres.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. Did you look at all of the thirty-one or thirty-two thousand [44] acres?

A. Well, I looked at enough of it so that I was satisfied that if it was sold right that we were interested.

Q. Now, I want to go back to the conference you had with Mr. Wilson when he told you first to not have anything to do with the Curry County tax land. What else was discussed besides the fact that he told you not to have anything to do with it?

A. He said, "Lay off of that and I will sell you some timber that you can make some money on." He said, "Stay away from the Curry County brush."

Q. That was all the discussion that you had with regard to Curry County tax land? A. No.

Q. What is the rest of it?

A. I met him again.

Q. I mean in this first conversation when he told you to lay off the Curry County tax land. What else, other than that, was discussed?

A. I didn't discuss the Curry County tax land with him.

Q. You didn't?

A. No, any more than that.

Q. Did you inquire as to the possibility of acquiring Curry County tax land, the first discussion you had with him? A. From him?

Q. Yes.

A. No, he was opposed to it, to having anything

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

to do. He [45] didn't want anything to do with it and told me so.

Q. That ended the discussion? That was all you talked about in that discussion?

A. I don't know whether that was all or not, that is that I remember.

Q. That is all you remember of the first discussion? A. Yes.

Q. Well, now then, were you at the first sale in August, 1943, at Gold Beach, when some tax title timber was offered for sale?

A. I was there. I didn't go in. I was crippled up at the time.

Q. You didn't attend the sale?

A. Not that time, not that particular sale.

Q. You didn't attend the sale? A. No.

Q. Did you have any discussion with Mr. Wilson regarding the bidding at the first sale in August, 1943, of the Curry County tax lands?

A. Yes.

Q. You say, "yes." Where was the conversation?

A. Well, I don't remember just where it was.

Q. Was it in Centralia or Gold Beach?

A. In Gold Beach.

Q. It was in Gold Beach? A. Yes, sir.

Q. Where in Gold Beach?

A. I don't know about that. I couldn't say just where it was. [46]

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. What discussion did you have with Mr. Wilson about the first sale of 1943 in regard to the bidding at that sale of Curry County tax land?

A. I gave Mr. Sherwood a signed check in blank. We didn't know how much it would come to. Mr. Sherwood was going to bid on the timber. Mr. Wilson stated that he was going to open brokerage office in Gold Beach, and he would like to bid the timber in. It wouldn't make any difference.

Q. He would like to do what?

A. Bid the timber in for us.

Q. And why? Did he state why?

A. Yes. He said that he was going to open a timber office in Gold Beach, and it would give him prestige, and he would like to do it.

Q. Now, this conversation that you had at Gold Beach with Mr. Wilson, and the one in which he told you to lay off the timber, was it the first time you had a conversation with him regarding the Curry County tax sale in August, 1943?

A. I don't know. The first time that Mr. Wilson came to me, he said, "I understand you are working on the Curry County timber," and, as I said, he advised me against having anything to do with it. He tried to discourage that, and said that he would like to sell us timber that we could make money on, and that it was good timber, that the Curry County tax timber was not good timber or it wouldn't have gone for taxes.

Q. Now, the next conversation was the one in

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

which he came to [47] you in Gold Beach, and asked for the privilege of bidding it for you?

A. No.

Q. What other conversations did you have with Mr. Wilson in the meantime?

A. The next time I met him there he said, "You are bound on going ahead with it, are you?" And I said, "Yes, we are going to bid on it." And he said, "Well, if you are stubborn enough to do it, I'd like to help you. I am not doing anything, and I would like to get started." And I said, "Well, I don't see where that enters into it," because on the Phillips tract and on the Lobster Creek tract I told him that any timber we wanted to know just what it was going to cost us. And he said that it would be clear and above everything, and I said, "Clear of everything?" and he said, "Yes, I will get my cut from the seller." I said, "Well, on the county stuff, there isn't going to be any cut because the county is not going to give any cut, and we certainly are not."

Q. And so then, he asked the privilege of buying it in for the purpose of getting the prestige in Gold Beach, is that right?

A. I made the statement that we had lost out on the first two tracts that come up, that, as I said it, unless our people got the county timber or could get a substantial amount of it, they weren't going to buy in Oregon. And when I told him that the county wouldn't pay a cut and we wouldn't, he said,

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

“Well, I’ll get mine in other ways. You made the statement that you [48] are not going to buy unless you buy the county stuff” and he said, “That will give you a nucleus, and I will fill in to complete the operation. That will give me a chance to sell you other timber to complete the setup.”

Q. Now, you knew that he had been in the timber business in Oregon for a good many months, didn’t you, at that time, Mr. Agnew?

A. Well, I have told you what I knew.

The Court: I think, counsel, that this is a good point to recess. We will recess until two o’clock.

(Thereupon, the noon recess was taken at twelve noon until two o’clock p.m.) [49]

November 10, 1949—2:00 P.M.

The Court: You may proceed.

Cross-Examination

(Continued)

By Mr. Maloy:

Q. Mr. Agnew, you stated before the noon recess that you learned of the description of the Curry County tax lands that were to be sold in the early part of August, 1943, from a newspaper advertisement. How did you happen to get that newspaper? Did you subscribe to the Gold Beach newspaper?

A. Yes.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. You are a subscriber to the Gold Beach paper, you were at that time?

A. I don't know whether I was at that time or not.

Q. I am asking you were you or were you not?

A. I don't remember.

Q. How did you come into possession of the newspaper which advertised that land for sale?

A. Well, it was general knowledge.

Q. I am asking you, how did you come into possession of it? A. Well, that I couldn't say.

Q. You don't remember?

A. I don't know whether Mr. McCutcheon had checked on it and had some figures on it and the list. In fact he had the marks on a map of what was coming up, a county map.

Q. Then, before it was marked on the map, he looked at the map, was it before or afterwards that he looked at the land? [50]

A. When we first looked at the land, I didn't know what was coming up for sale. I looked over and checked as near as I could the county lands that were proposed to be timber.

Q. In other words, you looked over all of the Curry County land, owned by Curry County?

A. No.

Q. That was supposed to be timber land?

A. Well, I wouldn't say all of them, but the first that I got on the check—I first got the check on the county land which was about sixty-two thousand

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

acres, but of that portion, I didn't know what was going to be put up, but I understood that it would be about half, and there would be some of the beach and grazing land that wasn't going to be sold at that time.

Q. Who did you learn that from?

A. These, of the thirty-two thousand acres I got from Mr. McCutcheon, the sixty-two thousand acres.

Q. When did you get those?

A. I think that was along the early part of July. I don't remember when, but I would say in July.

Q. Did you know what price they were going to be offered at?

A. Well, I don't think I did, but I had a number of figures on what the land had been selling for, and I assumed that it would probably be somewhere around five dollars.

Q. Did you understand that all of the county timber land was going to be sold?

A. No. I didn't understand that it was all going to be sold. [51] I think the first advertisement in the paper I think there was one township left out that was sold. It wasn't in the preliminary form.

Q. Do you know how Curry County tax lands are put up for sale or how it comes about that they are put up for sale?

A. As I understand it, the way they were going to do it was that the board had decided that they wanted to get more land on the tax roll, and they

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

were going to pick out certain land. I didn't know what land it was going to be.

Q. Did you know that it was customary for someone to apply to the County Board put that land up for sale?

Mr. Quinn: I object to that. You are asking a question now on a matter of legal procedure. Those are probably not in the knowledge of the ordinary layman.

The Court: I think the question calls for his understanding, Mr. Quinn, not as to whether or not that was the proper procedure, but what his understanding was.

The Witness: As far as the advertisement was concerned and the ad in the paper, we had gone into it quite some time before that come out; so how it is connected with that or the matters it covered I couldn't say.

Q. You said, "we." Who do you mean by "we"?

A. Mr. Sherwood and Mr. McCutcheon and Mr. Troxel.

Q. And had they gone and talked to the County——

Mr. Buffington: I am not sure he finished his statement.

Mr. Maloy: We will pass along to another one. [52] Mr. McCutcheon and Mr. Troxel and Mr. Sherwood, had they talked to the county authorities with regard to the putting up of the land for sale?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

A. I think Mr. McCutcheon had, but I am not sure.

Q. Had he applied to the county board to have these lands put up for sale?

A. Not that I know of.

Q. He hadn't reported to you that he had applied had he?

Mr. Quinn: Just a moment. I think you are going too far on that line of what somebody else might have done or what he has knowledge of, or whether it is necessary for them to apply.

The Court: I think it is permissible. I will permit it.

Q. (By Mr. Maloy, continuing): Now, do you know the basis on which the county tax lands in Curry County in 1943 were put up for sale? The manner in which the purchase price was to be paid?

Mr. Quinn: I think your question is ambiguous—the basis on which it was to be put up—you might ask him the method by which it was put up.

Q. (By Mr. Maloy): Do you know, in the event you bid for Curry County tax land in August, 1943, as to the manner in which the purchaser paid for the land?

A. It was to be appraised at a price of so much per acre, and it was to be sold, I think, at twenty per cent down accompanying the bid; and there was an extension of time, I don't remember [53] just what it was.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. You had the right to pay for the balance in eight installments?

A. I don't remember, but there was time on it.

Q. Did you consult anyone in Gold Beach, such as an attorney or anyone like that, with regard to the procedure or the legality of the sale of the timber lands? Did you consult anyone with legal authority as to the possible validity or lack of it of the Curry County tax lands for sale in August, 1943, or before that?

A. Well, there was Mr. Wilson—his version of it was that the tax title to land in Oregon wasn't good. And Mr. Kendall, I think he was the next judge, he was in Gold Beach and also in Port Orford; and one of the times that I met him I asked him his opinion on the legality and if he thought the county had the right, and his advice was that he thought it was all right, and that anyway the title could be cleared up by means of advertising.

Q. When did you first meet Judge Kendall?

A. It was in August.

Q. Of 1943? A. Yes.

Q. And where did you meet him?

A. Well, I met him once at Port Orford and once at Gold Beach.

Q. Where did you meet him first, in August of 1943? A. That I couldn't say. [54]

Q. Was it before or after the sale that was called for August, 1943?

A. Sir, there—it was between the two sales.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. You didn't meet him before the first sale in the early part of 1943? A. I don't think so.

Q. Did you attend the first sale in 1943?

A. I was there, but not in the room.

Q. You were not present at the sale?

A. No, no.

Q. Who introduced you to Judge Kendall in August, 1943? A. Mr. Wilson.

Q. How did it happen, if you know, that Judge Kendall happened to be in Gold Beach in 1943?

A. I don't know.

Q. Do you know why he was there?

A. No, I do not.

Q. Do you know whether or not Mr. Wilson secured his presence there at the first sale in August, 1943?

A. Well, later Mr. Wilson, they had some meeting it seems between the two sales, after the first sale; and Mr. Wilson stated that he had Judge Kendall there.

Q. Judge Kendall was there at the first sale, wasn't he, Mr. Agnew? A. I don't know.

Q. Didn't you meet Judge Kendall at Gold Beach at the time of [55] the first sale that was called off in August, 1943?

A. I don't believe I met him until after the first sale.

Q. The first sale was called off?

A. Yes, sir.

Q. Why was it called off? Do you know?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Mr. Quinn: That is going into statutory action. There may have been many reasons for calling it off.

The Court: It just calls for his knowledge of what the reason was. What the reason was is immaterial. His knowledge is what is important. I will overrule the objection.

The Witness (Continuing): My understanding was that it was not properly advertised.

Q. (By Mr. Maloy, continuing): Did Judge Kendall tell you that? A. No.

Q. Who told you that?

A. Well, I don't know.

Q. Did Mr. Buffington tell you that?

A. I don't remember who told me, because it was in the paper——

Q. Do you know who it was that caused the first sale to be called off, the one in August of 1943?

Mr. Buffington: If your Honor please, the witness hasn't finished the last answer. He said it was called off back there and then counsel interrupted with another question.

The Witness (Continuing): I don't know who caused it to be called off, but I understand that Mr. Buffington made some [56] objections, and it had been recommended that they readvertise.

Q. (By Mr. Maloy): Do you know whether or not Mr. Wilson and Mr. Buffington had been having some trouble about Mr. Buffington having objected

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

to the manner in which the sale in August, 1943, was being handled?

A. Mr. Buffington and Mr. Wilson had trouble at different times, I think, over the Port Orford mill and over the sale.

Q. I am talking about the sale of August, 1943, Mr. Agnew. Did they have trouble about that that you know of?

Mr. Quinn: Just a moment. I don't think that is proper cross-examination, unless they can show that Mr. Buffington represented this party.

The Court: I think that line of questioning goes to his knowledge, which I think is of some importance.

The Witness: Well, Mr. Wilson said that Mr. Buffington was trying to block the sale.

Q. (By Mr. Maloy): When did Mr. Wilson tell you that?

A. I don't remember. It was after this——

Q. He didn't tell you that——

Mr. Buffington: He was still answering the question. I think counsel should be cautioned that this witness speaks deliberately.

Mr. Maloy: I can't tell when he is through.

The Witness: My English is not very good, Mr. Maloy.

The Court: Let me say that if the question is asked [57] and you have not finished with your last answer, continue with your answer, or indicate that you have something more to say.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Mr. Buffington: We seek to give him the opportunity which he should have.

The Court: I have just instructed Mr. Agnew that if he has not completed the answer to keep on with his answer—either that or indicate that he is not finished; whereupon we will strike the question of counsel and let him continue with his answer. Mr. Agnew, you are going to be given the opportunity to answer the questions as fully as you want to.

Q. (By Mr. Maloy): Did Mr. Wilson advise you that he was endeavoring to block the sale, that Mr. Buffington was endeavoring to block the sale, before the sale in August took place?

A. That I don't know. Not that I know of, sir. Mr. Wilson said, I think he gave Mr. Buffington credit for blocking the sale.

Q. And he said nothing to you about Mr. Buffington endeavoring to block the sale before the sale took place? A. Not to my knowledge.

Q. Did you know that Mr. Wilson had gotten Judge Kendall to come down to Portland before the sale?

A. I didn't know that until I saw Judge Kendall, after they introduced me to him.

Q. Now then, did Mr. Wilson bid for you at the first sale? When I say the first sale, I refer to the one in August, 1943. [58]

A. I couldn't say for certain whether there was any bids really made or not at the first sale.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. You authorized him to bid for you, though, didn't you?

A. He asked to bid, and I told him I had no objections.

Q. And did you furnish him with any money with which to bid at the first sale?

A. I stated this morning that Mr. Sherwood had a signed check that was not filled in, and who held that check during the sale, I don't know.

Q. Was it your personal check, in blank?

A. You mean a personal check?

Q. Yes. A. A company check.

Q. In blank? A. Yes.

Q. Did you know at that time that in these county sales for taxes these county authorities were conducting the sale and required a certified check or draft or cashier's check?

A. Well, I had been told that they would recognize my check.

Q. Who told you that? A. I don't know.

Q. Was any money put up by anyone in support of the bid that was made by Mr. Wilson at that sale?

A. That, I couldn't say. If it did, it came back.

Q. Did Mr. Wilson put up any money of his own at that first sale?

A. Not that I know of. [59]

Q. You don't know if he put up some fifty-six hundred and eighty-five dollars on the first payment, on the first sale?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. I didn't know that Mr. Wilson ever put up any personal money on any of the timber.

Q. He never advised you of the fact that he had on that first sale? A. No.

Q. When you discussed the first sale being called off with Judge Kendall, have you any way of fixing the time and place of that conversation as to who was present? A. No, I haven't.

Q. Was Mr. Wilson present when you discussed it with Judge Kendall?

A. That I couldn't say.

Q. Do you know who Mr. Buffington was representing at the first sale?

A. Well, he was representing Mr. Netet, and I don't remember whether it was the first sale or both sales.

Q. He did represent at the second sale, the one in September, 1943? A. Yes, sir.

Q. In the conversation that you had with Judge Kendall, after the sale in August which didn't materialize, did you have any discussion with Judge Kendall as to whether he was going to take any part in arranging for the later sale at some later date? [60]

A. No, there wasn't much of a discussion on my part with Judge Kendall. I did ask him about the legality question. [61]

Q. And what did he tell you about the legality of the sale that might come up in September, 1943?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

A. I don't think I asked him anything further.

Q. Did he advise you that he and Mr. Buffington and the District Attorney had been conferring together with reference to bringing about a valid sale of this tax title timber in Curry County, Oregon?

A. Not to my knowledge.

Q. Well, not to your knowledge—what do you mean by that?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Now, there was a second sale, to wit, in September, 1943, was there not?

A. Yes, sir.

Q. Did you attend that sale?

A. Yes, sir.

Q. Now, going back to the sale in August of 1943, I would like to ask you, Mr. Agnew, whether you gave Mr. Wilson any specific instructions as to how much he should bid per acre for any particular tract that was being put up for sale?

A. So far as we were concerned, we had decided to bid the appraised value.

Q. The appraised value. Was this land appraised before it was put up for sale?

A. They put a price on it. Some of it was as low as two dollars [62] an acre, some of it was five dollars an acre. That was the appraisal.

Q. Then you gave him instructions to bid the minimum price that the county authorities fixed on the various types of land that was being sold?

A. Yes, sir.

Q. Did you give any instructions as to any spe-

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

cific tract that he was supposed to bid on at the first sale? A. Yes.

Q. What particular tract?

A. When it came up—I was there, and some of it came up that we didn't want, and then I shook my head "no," and if he was to bid on it, I nodded "yes."

Q. And that was the way the bidding was conducted at the first sale, was it? A. No.

Q. What is that?

A. I understood you to say "the first sale." No, I wasn't in there at all.

Q. Well, did you give Mr. Wilson any specific instructions as to what particular tract or tracts of timber he was supposed to bid upon for you at the first sale?

A. As I remember it, at the first sale we had decided to take what they called the Hunter Creek, I believe it was Township 37. And further than that I don't remember. In fact, I didn't pay very much attention to it because I didn't think that the first [63] sale was going through.

Q. Why didn't you think the first sale was going through?

A. Well, the question had come up about it not being properly advertised, and I knew there was considerable opposition, and I didn't think the board——

Q. (Interposing): How did you learn that—of that, Mr. Agnew?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. Well, I couldn't say how.

Q. Had you learned of it before the first sale? You did, did you not?

A. Well, it was right at the sale, I would say. About that time. I just——

Q. (Interposing): Well, the reason I am asking you, Mr. Agnew, is that awhile ago you said you didn't learn of the probability of that sale being invalid until after the sale. Now, which was it, after or before? A. Well——

Mr. Quinn (Interposing): Pardon me. I believe you are misquoting the witness. I ask you to refer back to the record.

Q. (By Mr. Maloy, continuing): You stated a while ago that you didn't learn about the legality of the first sale in August, 1943, until after the sale. Now, I am asking, was it after the sale that you learned that fact or before the sale?

Mr. Quinn: Well, I am objecting to his statement again because he didn't make any such.

The Court: He stated that that was Mr. [64] Agnew's statement, and, as I understand it, he is asking Mr. Agnew if that is true. (To witness): You may answer it.

A. As far as the legality or Mr. Kendall's advice on the legality, that had nothing to do with the bidding so far as we were concerned.

Mr. Quinn: I move to strike that as not responsive to the question.

The Court: That answer may be stricken.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. (By Mr. Maloy, continuing): What I am asking you, Mr. Agnew, is whether it would be—whether it was before the first sale in August, 1943, were you advised that there was a question as to whether the sale—such a sale would be valid? Is that clear? A. The first?

Q. The first sale. The first sale in 1943, that sale. A. Whether that sale would be valid?

Q. Whether you knew it before the sale or afterwards?

A. I wouldn't say I ever knew it. I only had my opinion.

Q. Did you have your opinion before or after the sale that the sale would not go through?

A. Well, it was when it came up and I realized or understood about the opposition that was against it.

Q. When did you learn that, before or after the sale?

A. Well, I was—that is, I—my opinion was before the sale that it wouldn't go through. But I wanted to be prepared so we gave Mr. Sherwood the [65] check.

Q. That is the check in blank that you spoke of?

A. Yes.

Q. And then it was before the sale of August, 1943, that you were of the opinion that that sale wouldn't go through because it was invalid, is that correct?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

A. Well, I didn't know whether it was invalid or on account of the opposition.

Q. Well, then, put it that way. On account of it being invalid or the opposition, you were advised or believed that it wasn't going through before the sale?

A. I don't think I was advised. I wasn't advised; it was only my own opinion.

Q. Well, now, what caused you to form that opinion, then, Mr. Agnew?

A. Well, there was opposition against it, and from what I had understood it was probable that it hadn't been properly advertised.

Q. Where did you get that understanding before the sale?

A. Well, I formed my own—you mean, someone told me or something?

Q. Well, where did you get the information from when you formed the opinion that the sale wouldn't go through on account of opposition or any other reason?

A. I don't remember where I got the information.

Q. But you got that information before the sale took place, whatever it was?

A. There was a question about it going through? Is that it? [66]

Q. Yes. A. Yes, sir.

Q. That was what I wanted to get at. Now, this

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

blank check that you gave to Mr. Sherwood, you first got that check back?

A. Well, I would assume so.

Q. And when you got it back, had it been filled out in any particular sum?

A. That I couldn't say.

Q. You, then, of course, I assume, destroyed it or canceled it? A. I think so.

Q. Now, were there any other tracts than what you call the Hunter Creek tract that you instructed Mr. Wilson to bid on at the first sale that were being offered at that first sale?

A. I couldn't say on that.

Q. Well, you didn't have anything to do personally with the arranging of that first sale in August, 1943, with county court or county commissioners, did you? A. No, I did not.

Q. And did anybody else on your behalf make the arrangement for that sale—of that Hunter tract at that sale in 1943?

Mr. Quinn: We are going to object to that because obviously it was the duty of the county commissioners up there to perform those functions, and they made the arrangement, not the individual.

The Court: We will ask the reporter to read the question. [67]

(Last question read by the reporter.)

The Court: In that form, I will sustain the objection.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. (By Mr. Maloy): Did anybody to your knowledge, representing you, Mr. Agnew, approach the county court or county commissioners and make an application for the sale of Hunter Creek tract at this sale of August, 1943?

A. I do not know of any.

Q. Do you know, Mr. Agnew, whether or not Judge Kendall, the attorney you have spoken of here, had anything to do in arranging or applying for the sale of tax title timber in Curry County at the second sale which took place in September, 1943?

A. I don't know.

Q. When you and Mr. Wilson and Judge Kendall discussed the matter, were there any conversations between you regarding the second sale?

A. Mr. Wilson and Judge Kendall and myself didn't discuss the sale.

Q. What did you and Judge Kendall and Mr. Wilson discuss then in your conversation you spoke of shortly after the first sale?

A. I asked Judge Kendall if, in his opinion, the county had the right to sell so that it would carry good title to the land taken over by the county for taxes. It wasn't regarding the sales.

Q. And it wasn't regarding the procedure that had been adopted by the county court in putting the land up for sale? That wasn't discussed at all? [68]

A. No.

Q. You mentioned having had another discussion with Judge Kendall at Port Orford. When did

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

that conversation take place and in whose presence?

A. I don't remember. I don't remember when it was. But that, as I remember it—about the only thing that I do remember was that he was speaking about the lake there at Port Orford and the fishing and so forth. I don't think that at that time it come up regarding any business.

Q. Well, when was this conversation at Port Orford, Mr. Agnew?

A. I couldn't say when that was.

Q. Was it in the month of September, 1943?

A. I wasn't—I wouldn't think so. I would think it was probably in August.

Q. Probably in August. Do you know whether or not Judge Kendall was there at the second conversation in September of 1943?

A. Yes, he was there.

Q. Was Mr. Wilson there? A. Yes.

Q. Do you know whether or not Judge Kendall and Mr. Wilson had been in any conversations with the county clerk relating to the second sale prior to it? A. I do not know.

Q. You had no conversations with Mr. Wilson with regard to it in the meantime? [69]

A. I wouldn't know about conversations. I wouldn't know, but—I don't know.

Q. Were you there in Gold Beach all the time between the time of the first sale which was in early August of 1943 and the time of the second sale which was early in September of 1943?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

A. No, sir.

Q. Were you present at the second sale in September of 1943? A. Yes, sir.

Q. Was Mr. Wilson present at the second sale in September of 1943? A. Yes, sir.

Q. And did Mr. Wilson bid for you at the second sale in September of 1943? A. Yes, sir.

Q. Do you—did you have any conversation with him in regard to his bidding at that sale, bidding in this Hunter Creek tract of timber at the second sale?

A. Well, I think that covered all that was bid on.

Q. You mean, the first conversation you had before the first sale in August, 1943, covered your arrangements for his bidding at the second sale?

A. No, I mean at the time of the second.

Q. At the time of the sale? A. Yes, sir.

Q. Well, you mean right at the time of the sale you had your next conversation with Mr. Wilson regarding bidding? [70]

A. Next conversation?

Q. Yes.

A. I wouldn't say about that. I don't know whether it was the next time one or what it was as far as that goes.

Q. Well, had you had any previous conversations in the meantime between the first sale and the second sale? A. Yes.

Q. How many times do you suppose you talked with him about the second sale?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. I don't know.

Q. He was up at Centralia and saw you during that period, hadn't he?

A. I don't remember him being in Centralia during that period.

Q. By the way, how many times had he been in Centralia seeing you in April, May and June of 1943?

A. I don't remember.

Q. Half a dozen times?

A. I wouldn't say that many. I don't know. He was going through quite often.

Q. He was up there quite frequently, wasn't he, talking to you about these various matters?

A. No, he was not. The trips were on the Phillips and Lobster Creek—and then I don't remember him being there until after we started buying, starting with the Rutherford piece and from then on.

Q. Well, you say he was up there though between August, the [71] time of the first sale and September, the time of the second sale?

A. I didn't say that.

Q. Well, I understood you to say that. Was he or wasn't he?

A. I don't think so.

Q. Well, then, when did you return next to Gold Beach after the first sale fell through?

A. I don't remember when we left or when we returned.

Q. You did return though for the second sale?

A. Yes.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. And did you have any conversation with Mr. Wilson relating to the conduct of the second sale before the sale took place? A. Yes.

Q. Well, when was it, and where, and who was present? A. Oh, I couldn't say that.

Q. What is that?

A. I couldn't say. I don't remember.

Q. Was there any specific instruction given by you to Mr. Wilson regarding the bidding at the second sale?

A. Well, to decide on the land that was to be bid on, and I stood there and when a piece come up that we wanted I nodded for Mr. Wilson to go ahead.

Q. Well, now, was there any additional timber come up over and above the Hunter Creek tract?

A. Oh, yes.

Q. And did you bid on it at the second [72] sale?

A. You mean, did I bid or did Mr. Wilson?

Q. Well, did Mr. Wilson bid for you?

A. Yes.

Q. How much additional timber other than the Hunter Creek tract did you instruct Mr. Wilson to bid on at the second sale?

A. Well, the Hunter Creek tract, as I remember it, had about around, I would say, between five and six thousand acres, and I think we bid in around twenty-eight thousand acres, if that answers the question.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. I think so. And was any price fixed at which you would bid for all of this timber, the total of some thirty-five thousand acres or such a matter?

A. The price set out by the board.

Q. That is the minimum prices? A. Yes.

Q. And—I don't recall—when did you say you had this conversation with Mr. Wilson regarding the bids and amount of timber that he should bid on? When? Before the sale?

A. Well, I think that was just when it came up. That was governed right at the sale, at the time of the sale.

Q. You had no previous conversations before the sale?

A. They put up some pieces—say it was on the beach or something—that we didn't want, that was isolated from the rest of it and when I didn't want it——

Q. (Interposing): You mean that was all handled right at the sale? [73]

A. That is as I remember it.

Q. He did the bidding, didn't he?

A. Yes, I think he did all the bidding.

Q. Were there any other bidders at that sale other than Mr. Wilson bidding for you?

A. Yes.

Q. Who else?

A. Mr. Nettleton, and I think there were some other bidders that——

Mr. Quinn (Interposing): Just a minute. Do

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

you understand that question? I think the question was, "Was there any other bidder at the sale bidding for you." I don't think you intended to answer that question.

Mr. Maloy: I said, "other than Mr. Wilson bidding for you."

Q. You said Mr. Nettleton?

A. I think there were other bidders there.

Q. Was Mr. Nettleton there in person?

A. I don't remember whether Mr. Nettleton was there, or Mr. Buffington bidding for Mr. Nettleton.

Q. Mr. Buffington was there bidding at that sale also, was he? A. I think so.

Q. Well, how much land did—or, I will put it this way: How much land was acquired from Curry County upon the bids made by Mr. Wilson at the second sale?

A. Well, I think about twenty-eight thousand acres. [74]

Q. Twenty-eight thousand acres. And did Mr. Wilson put up any money on that purchase of his own? A. Not that I know of.

Q. Did you deal with the authorities yourself in paying for that timber that was bid in at that sale?

A. As I remember it there were drafts aggregating around forty thousand dollars made out to Mrs. Walker, and just how it was handled, I don't know. I think those were put there and the bids were charged against that.

Q. Well, did you deliver that forty thousand-

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

dollar draft, or was it a cashier's check, to Mrs. Walker?

A. I don't remember. I think I gave that to Mr. Wilson.

Q. You think you gave that to Mr. Wilson? That draft or cashier's check was then delivered by Mr. Wilson to Mrs. Walker, was it not?

A. Well, just how that was handled, I don't know.

Q. Well, you got back the canceled check or draft showing Mrs. Walker's endorsement on it, didn't you?

Mr. Quinn: We have the draft here if you want it.

Mr. Maloy: Well, he ought to know.

Mr. Quinn: I have the draft on it. He ought to be shown the draft.

Q. (By Mr. Maloy): Was it all in one draft or were there a number of drafts?

A. Well, to start with I think it was one draft for forty thousand dollars, and I think it was broken down into eight [75] five thousand-dollar drafts.

Q. Now, did you have any dealings with Mrs. Walker or anyone else of the Curry County regarding the making out of any deeds or contracts covering this purchase made at the second sale of September, 1943?

A. No; on the details, I did not.

Q. Who handled that? A. Mr. Wilson.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. And I will ask you if it isn't a fact, Mr. Agnew, that Mr. Wilson arranged for allocating a certain portion of the purchase price so that you could acquire complete title to Section 36 which was bid upon at that first sale—I mean, the second sale of September, 1943?

Mr. Quinn: Will you kindly read that question over again?

(Last question read by the reporter.)

A. The way it started out it was to be twenty per cent of the purchase price was to be paid at the time of the sale before the papers were made out. Mr. Wilson said that the Evans Product Company wanted to trade fir for the Port Orford timber, Port Orford cedar timber.

Q. (By Mr. Maloy): And, so, did Mr. Wilson cause the county authorities to issue or make and execute a deed to the Section 36 which had this Port Orford cedar upon it?

A. It wasn't a deed. It wasn't—it didn't take the property. It was just the timber, just the cedar timber. [76]

Q. You mean that was just the cedar timber that was traded to the Evans Product Company?

A. Traded to the Evans Product Company.

Q. Well, but the deed was executed and delivered by the county authorities to Mr. Wilson as trustee?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. Yes, sir; I didn't know that until later; why it was done. I have never been able to find out.

Q. Mr. Wilson handled the transaction?

A. Yes.

Q. You had nothing to do with that whatsoever?

A. That is right. I didn't know about it.

Q. And that particular piece of timber, that was taken in Mr. Wilson's name as trustee, was that paid for in full?

A. It was paid for, the whole township thirty-seven was paid for in full. That had to be paid for in order to release it to make the trade. The county couldn't let us trade the timber until the whole thing was paid for; so, instead of twenty per cent, Township 37 was paid for a hundred per cent, twenty-eight thousand some hundred dollars. And Section 36 was in that.

Q. And Mr. Wilson arranged that?

A. Yes, I imagine so. We had to do it in order to trade the cedar.

Q. In other words, you had to have a good title before you could make a deal with the Evans Product Company? A. That is right. [77]

Q. And did you know about that, that it was necessary to have the title in that manner at the time? A. Yes, I knew it.

Q. Now, I want to ask you this—

A. (Interrupting): I knew that it had to be paid for. That is what I mean. I knew that the land had to be paid for before we could make the deal.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. You knew that at or about the time of the sale of September of 1943? A. Yes, sir.

Q. Now, were there any other tax title purchases in Curry County, Oregon, after this one in September, 1943? A. Yes, I think there were.

Q. And, by the way, before I forget it, the full consideration for these tax lands that were purchased in the sale of September of '43 were finally paid out in full, were they not? A. Yes, sir.

Q. And did you get a deed?

A. From the county, yes.

Q. In your name? A. Yes, sir.

Q. And you still have it in your name, haven't you? A. Yes, sir.

Q. All right. Now, then, what other Curry County tax lands were purchased by you in Curry County, after the sale of September, 1943? [78]

A. Why, I couldn't say just what they were. Mr. Sherwood and Mr. McCutcheon, they checked over it. I don't know how much but portions of the remaining timber owned by the county. It was recommended the purchase of certain portions of it. Just what they were, I don't know.

Q. Well, how many additional purchases were there of Curry County tax land, after the one of September? A. I don't know.

Q. Who handled the transactions with the county, the purchase of the tax title timber?

A. Well, Mr. Sherwood and Mr. McCutcheon was the ones that picked them out and recom-

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

mended the purchase of them. And I think Mr. Wilson purchased them for us.

Q. And the title to those were also taken in your name? A. Yes, sir.

Q. You didn't have anything to do with any of those transactions?

A. In what way do you mean?

Q. I mean, you didn't bid the land from the county, nor you didn't pay the consideration personally, yourself?

A. No, not hand it over; no, I did not.

Q. Mr. Wilson took care of all of that?

A. I would say he took care of most of it. He handled that part of it.

Q. Do you know, Mr. Agnew, who made the application to the county to purchase these additional tracts of county tax land? [79] A. I do not.

Q. Now, going back to the Port Orford Mill.

Mr. Quinn: I wonder if we could have a little recess?

The Court: Very well, we will take a ten-minute recess, and we will run enough longer to make that up.

(Thereupon, a short recess was had at 3:10 p.m.)

The Court: You may proceed, counsel.

Q. (By Mr. Maloy): Mr. Agnew, before questioning you further regarding the Port Orford Mill, I would like to ask you whether you know

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

if it was customary for Curry County to sell tracts of timber land in sections or quarter sections, or townships?

Mr. Quinn: I object to that question as calling for the conclusion of the witness and something outside of the issues in this case—what the custom was.

The Court: He is not asking for the custom. He is asking if he knows of such a custom. I think that is permissible.

The Witness: I don't know.

Q. (By Mr. Maloy): Do you know how it happened that in the instance of these sales that these timber lands were put up in townships?

A. No, I don't.

Q. You don't know whether that had been previously arranged with the county court or commissioners, do you? [80]

A. I do not.

Q. You didn't have anything to do with that, with it having been put up in townships, did you?

A. No, I did not.

Q. Now, at this sale in September, 1943, were there any competitive bids?

A. I don't remember of any.

Q. Was there any competing with Mr. Wilson on the bid that he made for the timber when he purchased and subsequently transferred it to you?

A. I don't remember of any competitive bids at the sale.

Q. Now, turning to the Port Orford Mill deal, I believe you stated that when you first began to talk

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

about the mill in April of 1943, when you first met Mr. Wilson—am I correct in that?

A. I wouldn't think so because I don't remember anything about it. I remembered it; it was in the summer, but when, I don't know.

Q. Could it have been in May of 1943?

A. I don't know, Mr. Maloy.

Q. You have no independent recollection?

A. No, I have not.

Q. It was, however, discussed in the early spring or summer of 1943? Is that correct?

A. Well, one trip that I made regarding that was on Thanksgiving Day, and how long before that it started, I don't know. I [81] think it was Thanksgiving Day.

Q. Well, I understood you to say this morning that Mr. Wilson discussed the Port Orford mill with you in the spring of May and June, 1943?

A. It might have been, but I won't say when. That is the only definite date that I remember of any one thing regarding the Port Orford Mill.

Q. Was there any discussion in May or June of 1943 with Mr. Wilson, either in Centralia or Gold Beach, or any other place, regarding your desire to acquire some timber as a nucleus for the Port Orford Mill?

A. No, there wasn't. There wasn't any talk regarding any timber, any portion of timber for any mill. This was all one deal for the Eastern Railway & Lumber Company.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. Well, Mr. Wilson dealt with you personally in all of these transactions, didn't he?

A. Yes, sir.

Q. He didn't deal with any other officer of the Eastern Railway Company or whatever you call it?

A. No, sir.

Q. And all of the timber that was acquired through these various transactions we have so far discussed, the title was taken in your name as an individual? A. It was taken in my name.

Q. Now, did you discuss with Mr. Wilson the matter of acquiring the Port Orford Mill during the summer of 1943? [82] A. Yes.

Q. Well, what time during the summer of 1943 did you first discuss it? A. That I can't say.

Q. Do you remember his advising you of the Port Orford Mill being in financial distress?

A. Well, that come up after we were—after we were talking about it. I don't remember whether that was at the start or not.

Q. Now, can you fix the time that you discussed the acquisition of the Port Orford Mill, or the acquisition of the stock control with relation to the sale of August, 1943, the tax sale?

A. No, I don't know. There was no connection between them in any way and I wouldn't have any way—

Q. (Interposing): Isn't it a fact, Mr. Agnew, that you were in Port Orford for checking up the assets, the value of the assets of the Port Orford

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Mill as early as on or about August 5th or 6th, 1943? A. I wouldn't—I couldn't say.

Q. Can you say one way or the other?

A. I do not know.

Q. You have no independent recollection?

A. I never took the Port Orford Mill very seriously and I don't know.

Q. Do you remember meeting Mr. Wilson and Mr. Kendall of Portland at the Port Orford Mill in August, 1943? [83] A. No, I do not.

Q. Well, were you or were you not there? Did you or did you not meet them at that time?

A. The only time that I remember meeting Judge Kendall at Port Orford, he came to the cabin with Mr. Wilson—I forget what it was about and they were with someone else there. Mr. Wilson was going to meet someone there and Judge Kendall talked to me about fishing in that lake.

Q. When was that?

A. I don't know. It was late in the evening.

Q. Where was this cabin? Port Orford?

A. Yes.

Q. Then you did meet Judge Kendall at Port Orford some time in the late summer of 1943?

A. I think I met Judge Kendall at Port Orford and I think I met him at Gold Beach once, but both times was very short.

Q. And you also met him in Coquille, didn't you, in September, 1943?

A. I never remember meeting him in Coquille.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. Do you remember ever meeting Judge Kendall and Mr. Wilson and Mr. Stapleton in Coquille in September, 1943, whereat there was a discussion about acquiring stock of the Port Orford Mill?

A. I don't remember it.

Q. Well, you can say where it did or did not take place?

A. I don't remember.

Q. Well, did you and Mr. Wilson at any time during August or [84] September, 1943, discuss between yourselves the idea or the purpose of acquiring the stock control of the Port Orford Mill company?

A. Well, I don't remember about the stock control, but I remember that a discussion was had many times about buying the mill.

Q. All right; did you discuss with him during August or September the buying of the mill, all of its physical assets?

A. Well, a man by the name of Stapleton, as I remember it, was the one that was talking to Mr. Wilson about the mill, and he was going to sell the property. And we come to find out that he wasn't even an officer of the company. I don't know what happened.

Q. He was president of the company, wasn't he?

A. As I understood it, he wasn't an officer. As I understand it, he had control of the stock, but when it came to the showdown of being able to sell the mill, he didn't have that authority. I am quite sure on that.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. Were you going to buy the mill? Were you going to buy the mill from the company if Mr. Stapleton did have authority?

A. It was only in the talking stage, and as to whether it got down where we was going to buy it, I wouldn't say that it had gone down to that point. I think that it wasn't that. We offered to put some money into escrow providing it could be worked up and the claims all paid and the debts all paid, and turned over free and clear. [85]

Q. When was that? A. I don't remember.

Q. Well, you can't say whether it was July or August or September of 1943? A. No.

Q. Was Mr. Wilson present at these negotiations? A. What negotiations?

Q. With Mr. Stapleton, relative to acquiring this control, of this mill company, and putting these matters in escrow that you speak of?

A. Well, I went down to San Francisco once and met Mr. Wilson and Mr. Stapleton there. I met Mr. Wilson many times as far as that goes.

Q. When? A. During the summer of '43.

Q. And on these numerous occasions that you mention, did you discuss with Mr. Wilson the acquisition of the Port Orford Mill?

A. Yes, the Port Orford Mill was sort of a pet of Mr. Wilson's. He wanted us to buy it.

Q. He wasn't selling it to you, was he?

A. No. As I told you this morning, he said his

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

object was to get us to manufacture and consume logs.

Q. And there was no conversation, however, between you and Mr. Wilson about his acquiring any timber for the mill, was there? A. No.

Q. Well, now, then, did anything ever come out of your negotiations [86] relative to acquiring the Port Orford Mill at Port Orford, Oregon? Did anything ever come out of it?

A. That is, you mean, acquiring the mill?

Q. Yes. A. No.

Q. Did you acquire a mortgage on the mill at any time during the fall of 1943, or the late summer? A. Yes, sir.

Mr. Quinn: I object to that line of testimony, in that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: Yes, sir.

Q. (By Mr. Maloy): Do you remember when it was that the mortgage was acquired?

A. No, I do not.

Q. Did you handle the transaction yourself?

A. No, sir. Mr. Bennefield of Marshfield handled the transaction, or attempted to.

Q. Well, do you know who negotiated for the purchase of the mortgage? Was it Mr. Bennefield or Mr. Wilson?

A. That I couldn't say. I think it was Mr. Wilson. I think Mr. Bennefield acted as counsel.

Q. You and Mr. Wilson had a couple of con-

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

versations during the summer of 1943 with Mr. Bennefield? A. Yes, sir.

Q. And you also authorized Mr. Bennefield to go ahead and [87] represent Mr. Wilson in regard to the foreclosure of the mortgage on the Port Orford Mill?

Q. Well, I don't remember whom I authorized. Mr. Wilson was handling it, and Mr. Bennefield was the counsel.

Q. You did acquire the mortgage?

Mr. Quinn: I don't want to object, but the question is incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. (By Mr. Maloy): You did acquire the mortgage? A. Yes.

Q. And did Mr. Bennefield foreclose it? Or do you know?

A. Well, just how far that got, I don't know. It was paid, but how far the progress went, I don't know.

Q. Did Mr. Wilson have anything to do regarding the foreclosure of the mortgage?

Mr. Quinn: I am going to object to that. I don't know what that has to do with proving a joint venture in this matter.

The Court: I will overrule the objection. I am not going to permit it to go too far or get to the point where it is not material. But within certain limits I think it has some very particular bearing on the case.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. (By Mr. Maloy): Did Mr. Wilson handle the foreclosure proceedings along with Mr. Bennefield?

A. Yes. Just how it was done, I don't know. [88]

Q. And is it not a fact that when Mr. Bennefield wrote you a letter regarding the proceeding, the foreclosure proceeding, that you immediately forwarded to Mr. Wilson the original letter?

A. I don't remember Mr. Bennefield sending me the letters. But he probably did. I don't remember it.

Q. You don't remember forwarding them to Mr. Wilson, and asking him to look after them?

A. I don't remember.

Q. You didn't have anything to do with the matter of foreclosing the mortgage or attempting to acquire the title to the property, to the mill, did you, personally? A. No.

Q. You put up the money?

A. Only put up the money.

Q. You bought the mortgage?

A. Paid the bills.

Q. Do you know whether or not the mortgage was foreclosed? A. I don't know.

Q. You did get your money back though?

A. I think so.

Q. And interest, and attorneys' fees?

A. Yes; there was some squabbling, but I think that was taken care of.

Q. And who handled the getting of the matter

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

settled up and closed, and you getting the money back? Mr. Wilson or [89] Mr. Bennefield?

A. I really couldn't say.

Q. You knew that Mr. Wilson made several trips to San Francisco on the matter, didn't you?

A. I don't remember that he did. Mr. Wilson lived at San Carlos at that time. I couldn't say. At the time I went down, I met Mr. Wilson in San Francisco. [90]

Q. Now, in all these transactions up to date, Mr. Agnew, including the matter pertaining to tax title timber, you didn't pay him any compensations for that work, did you?

Mr. Quinn: I object to that question. Does that include the Port Orford Mill?

Mr. Maloy: No; I am going to take that separately.

A. What was that again, please?

Q. I say, you didn't pay Mr. Wilson any compensation for the handling of these various tax sales?

Mr. Quinn: I object to that as incompetent, irrelevant and immaterial. It is a conclusion of the witness.

The Court: Objection overruled.

A. No; that was carried on just as I stated this morning. Mr. Wilson said he wasn't doing anything and he would be glad to carry on.

Q. All right. And is that also true regarding his services and the work and labor he did pertaining

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

to the acquisition of the mortgage in the Port Orford Mill and foreclosure?

Mr. Quinn: Just a minute. I object to that as incompetent, irrelevant and immaterial. It is no part of this case based on their complaint here on the question of joint venture. They were to acquire timberlands according to their theory of the case and resell them at a profit.

The Court: I will tell you, Mr. Quinn, the reason I am overruling your objection on this is because these questions do have some bearing and cast some light upon the question of [91] whether or not these people were joint venturers, and that is the sole purpose upon which I am admitting the testimony.

Q. (By Mr. Maloy): Will you answer the question, please? The question was: Did you pay Mr. Wilson any compensation for his services and the work and labor he did in connection with the Port Orford Mill?

Mr. Quinn: We will reserve our objection.

A. I don't think so.

Q. (By Mr. Maloy): Now, up to the time that you acquired your mortgage on the Port Orford Mill, Mr. Agnew, how often did you see Mr. Wilson?

A. Oh, I don't know. This Port Orford Mill would seem to be a hobby of Mr. Wilson's, and I never thought much of it; never give it very much consideration. But Mr. Wilson wanted to get it,

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

wanted to operate it, and we were operating the mill in Centralia and Mr. Wilson says that will get you started down here manufacturing, and said, "I will sell you more timber." And that was the set-up.

Q. Well, you had already acquired some twenty-eight thousand acres of timber from Curry County, hadn't you?

A. The Port Orford Mill was entirely separate from the timber.

Q. Well, however, it was the nearest mill to the timber that you had bought from the county of anywhere in Oregon, wasn't it?

A. Yes, but their plan was to Port Orford Mill. It wasn't situated so that the timber had been cut out around the Port Orford Mill. It was really a proposition of peak operation. [92] Operated for a short time, but it would have to be moved. The timber had practically been exhausted around the Port Orford Mill. The haul was too long.

Q. Then did you acquire the mortgage and foreclose that mortgage on it for the Port Orford Mill with the view of moving that mill?

A. Well, the idea was to be bought was to cut out what little there was if it wasn't too far a haul. There was then a demand for lumber, and we would ship it—ship the uppers to the Centralia plant and kiln dry it and manufacture it there. It was a green mill and an old mill. It wasn't much of a mill; it was an excuse really.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. I realize that, Mr. Agnew, but, nevertheless, would the ownership of a mill anywhere in the vicinity or locality of any timber that you had previously purchased from any source have any bearing upon the future value of that timber?

A. Sir?

Q. I say, would the acquisition of the Port Orford Mill have any bearing upon future value of any timber that you had acquired anywhere in the vicinity?

A. I don't think the Port Orford Mill would be considered an asset or advantage to any timber as far away as that timber is from the Port Orford Mill.

Q. Well, it is the nearest mill to any timber you had acquired, wasn't it?

A. They couldn't operate it; it was torn down and dismantled. [93]

Q. Then your purpose of buying or acquiring the mortgage on the Port Orford Mill was for the purpose of dismantling the thing, was it?

A. Well, probably after I figured that at the best it would be a short operation with the Port Orford Mill.

Q. Then you were going to dismantle it if you got title to it?

A. Well, that is the way it looked, and it looked like it would have to be bought cheap enough to operate it a short time. That is the way it looked to me.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. And that was the plan Mr. Wilson was trying to sell you—to buy the Port Orford Mill

A. Well, I don't know what Mr. Wilson's plans were. We didn't agree on our plans; I don't know what his plan was.

Q. Did he tell you what his plan was and what his purpose was in trying to get you to buy the Port Orford Mill?

A. Mr. Wilson was quite a visionary. He had a great many ideas that didn't coincide with mine; about that I couldn't say. We looked at a number of mills.

Q. Well, but, nevertheless you put up your money and bought the mortgage, didn't you?

A. That is right. That was a business proposition because we figured the mortgage was good.

Q. At the time, Mr. Agnew, that you were foreclosing the mortgage on the Port Orford mill, were you in the process of acquiring any other timber than tax title timber in Curry County?

A. Well, it extended over—drawn out over quite a period, and [94] I think while the mortgage was still hanging on, it was run into the time when we were buying other timber.

Q. In other words—See if I am correct, Mr. Agnew—the foreclosing proceedings dragged out over a period of a year or eighteen months?

A. I don't remember how long.

Q. Well, approximately, would you say?

A. Well, I wouldn't attempt to say.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. Very well, but during that period of time that the mortgage was being foreclosed, and you were endeavoring to get title you were acquiring other timber or endeavoring to acquire other timber in the immediate vicinity of the Port Orford mill?

A. Well, we never did buy any timber in the immediate vicinity of the Port Orford mill.

Q. All right. How far is the Rutherford tract from Port Orford Mill? A. Too far to haul.

Q. How far was it?

A. I was trying to locate Port Orford. It is thirty miles north of Gold Beach; I believe they called it about fifty-five miles.

Q. Well, at that time the owner of the mill hauled logs from the Rutherford tract?

A. They hauled, I think it was one "Forty."

Q. And that was the very time you were dealing for the Rutherford tract, wasn't it? [95]

A. No, that was prior to that. That was—I think they were cutting the timber off that forty the first time I was at the Port Orford mill, but they didn't do it long.

Q. Well, now, how far is the Frick tract from the Port Orford mill?

A. Oh, it would just be a guess.

Q. Well, what is your best idea of it?

A. Twenty-five.

Q. And you acquired title to the Frick tract later on, didn't you?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. Yes. I don't remember just when it was, but, yes.

Q. In the fall of '43 or the early part of '44, wasn't it?

A. No. I think it was later '44 if I remember right, but I am not sure.

Q. I see. Well, the date doesn't matter much. How about the Reynolds tract? When did you acquire title to that?

Mr. Quinn: May it please the Court. The deeds are here and they can get him the exact dates. You must remember this happened a long time ago.

The Court: Of course if he doesn't know he can so state and the deeds will be the best evidence, but if he doesn't remember he can so state.

Q. (By Mr. Maloy): What about the Reynolds tract, Mr. Agnew?

A. You mean as to how far that is?

Q. Yes. How far is that away from the Port Orford Mill?

A. I don't know, but I think about eighteen or twenty miles. [96] I am not sure.

Q. And you acquired title to that during the fall of '43, or the early part of '44? Somewhere along there?

A. Yes, but there was no connection with the Port Orford mill, my buying it.

Q. Well, the Daley Breed tract, how far is that away from the Port Orford mill?

A. Oh, thirty miles, probably thirty-five miles.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. Now all of those tracts that I have just mentioned, those four tracts have quite a large amount—shall I say merchantable timber, on them, haven't they? A. Yes.

Q. Running into many millions of feet?

A. Well, it would run into millions, yes.

Q. But there is no connection between your acquisition of those tracts of timber, as I understand you, and the attempt to acquire the title to Port Orford mill?

A. Not buying them, absolutely not.

Q. None at all? You know, do you not, Mr. Agnew, from your personal experience as a lumber man and sawmill man that they haul logs long distances now to the mills, especially in this vicinity? That is right, isn't it? A. Yes.

Q. You see trucks every day on the highway, interfering with our usual modes of transportation to——

Mr. Quinn: Of course that is facetious. [97]

Mr. Buffington: I think that is highly argumentative, not factual at all.

Q. (By Mr. Maloy): Well, now, did you acquire in your dealings with Mr. Wilson, after you had acquired the tracts of tax title timber in Curry County, any privately owned land in Curry County other than these four tracts that I have just described or mentioned? A. Privately owned?

Q. Yes, private owners. A. Yes.

Q. Did you acquire a tract of timber known as

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

the Bankus tract? A. Yes.

Q. And where is that tract of timber located?

A. Well, it is, I would say, mostly on the Chetwood River.

Q. In Curry County, Oregon? A. Yes, sir.

Q. And who handled the negotiations looking to the purchase of that tract of timber?

A. Mr. Wilson.

Q. And over how long a period of time, if you know, was he negotiating for the tract of that timber with Mr. Bankus? A. I don't know.

Q. Well, maybe I can refresh your memory. Was it over a year that he was dealing with Mr. Bankus endeavoring to make a deal with him?

A. Well, as I remember, at the time of the sale there was [98] something about the timber that Mr. Bankus used and the timber that the county had taken for taxes and started in on it, and it came out that he wanted to see if he could get some concession from the county or something, and I don't think anything was done then and it run along. It might have come up at different times.

Q. The Bankus tract was heavily encumbered with delinquent taxes, wasn't it, at the time Mr. Wilson was negotiating for it?

A. Yes, a lot of the timber was.

Q. And that probably is also true of the Breed tract and the Rutherford tract and the Reynolds tract. All of those tracts were way behind in the payment of the taxes?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

A. Well, I wouldn't say all of them, but I know some of them were.

Q. And so, therefore, in acquiring these privately owned tracts of timber, do you know whether or not there was a considerable period in which negotiations were carried on? A. Yes, there were.

Q. And that is also true of the Bankus tract?

A. I think so.

Q. Did you have any negotiations at all with Mr. Bankus?

A. Well, I met Mr. Bankus and he talked about the timber and he wanted to hold out certain river frontage; he had a town site there and summer homes planned, and it was discussed two or three times.

Q. You discussed it two or three times with Mr. Bankus? [99] A. Yes.

Q. When did you first meet Mr. Bankus?

A. Oh, I couldn't say.

Q. Was it early in the negotiations?

A. Yes, I think it was.

Q. Do you remember where it was that you met him when you first talked to him about these negotiations?

A. Well, I met him at Brookings a couple of times.

Q. Where did you meet him in Brookings?

A. You mean what building?

Q. Where did you meet him? In his office or home or where? A. I don't remember where.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. Who else was present at the time you first met him in Brookings?

A. I couldn't say that. I know one of the meetings; Mr. Wilson and I met him, I think at his home.

Q. At his home. Was that on a Sunday?

A. I couldn't say.

Q. When was the next time you met him and carried on any negotiations with him in regard to the purchase of the Bankus tract?

A. I don't know as I can tell you, if you would call them negotiations that were discussed with him. There were certain things that he seemed like he wanted to sell. He wanted to have a number of reservations. It wasn't ever really clean cut so you could tell just what. [100]

Q. Well, with reference to the first time that you talked with him or discussed with him the possibility of acquiring this timber, where was it that you met him on the second occasion? Can you give us any idea of that?

A. No, I couldn't. I couldn't say.

Q. Where did you meet him the second time and who was present?

A. I don't remember that.

Q. How long after the first time was it that you talked with him the second time?

A. I don't know. I think I met him once in Crescent City, too.

Q. Was Mr. Wilson present?

A. I think so.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. All right now——

A. (Interposing): I think once when Mr. Wilson wasn't present and I think the other time Mr. Wilson was.

Q. When was the time you talked with him, to him when Mr. Wilson wasn't present?

A. I don't know; I don't remember.

Q. Was that the first time?

A. Oh, I think the first time that I met Mr. Bankus and talked with him about the timber was early and Mr. Troxel was with me and he was more interested in town sites than he was in selling timber. He said he had a lot of timber; he thought he would sell it, but other than that I don't remember much about it.

Q. Was that the first time you talked with him when Mr. Troxel was present? [101]

A. I think that was the first time; I am not sure.

Q. Mr. Troxel is the gentleman now dead?

A. Yes.

Q. When did he die, by the way, Mr. Agnew?

A. I think in June, 1945.

Q. Now, have you any way of telling us when was the third time that you and Mr. Bankus met?

A. No, I haven't.

Q. Nor where it was, nor who was present?

A. (Witness shaking head indicating negative response): I think I met him at Crescent City once.

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

Q. Who brought to your attention the Bankus tract in the first instance?

A. Mr. Wilson. Oh, the first time was Troxel, but that was quite some time ago. That was, oh, I would say in the winter of '32 and '33. No, I mean '42 and '43.

Q. The winter of '42 and '43? A. Yes.

Q. Were you operating down in this country in '42? A. No.

Q. You hadn't purchased any timber down here in '42, had you? A. No, we hadn't.

Q. Well, then, did Mr. Troxel—You say in '42—direct your attention to the Bankus tract? Was it then that you went and talked—I am asking you, Mr. Agnew, whether Mr. Troxel and you first saw Mr. Bankus in 1942 regarding the purchase of the [102] Bankus tract?

A. I understood you to say who was the first one that called my attention to the Bankus timber.

Q. I asked you that and then I asked you this last question whether it was in 1942 that you and Mr. Troxel saw Mr. Bankus. I understood you to say heretofore that Mr. Troxel brought that to your attention and you first saw Mr. Bankus when Mr. Bankus and Mr. Troxel were present. Now what is the fact?

A. Well, I think that is correct. I am not sure about when I saw him, but I am sure it was Mr.—it doesn't make any difference but it was Mr. Troxel that told me about the Bankus timber and how he

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

come to get it and about what status it was and what the taxes were against it. That is the thing that stands out in my mind.

Q. And that is in 1942? A. I think so.

Q. And then how long after Mr. Troxel directed your attention to the situation on the Bankus tract was it that you and Mr. Troxel went to see Mr. Bankus?

A. Well, we didn't go to see him. That is, we didn't make it a point. You asked when it was or who it was that called my attention to the Bankus timber first.

Q. Well, let me see if I can get you straight. It was you and Mr. Troxel that first contacted Mr. Bankus with the view of purchasing the Bankus tract? A. No, I didn't say that. [103]

Q. Who was it then that directed your attention to Mr. Bankus' tract?

A. It was Mr. Troxel that called my attention to the Bankus tract, but he didn't talk selling it to me. He was just recommending it.

Q. All right, then, who was it?

A. He wasn't a timber broker.

Q. Who was it that first directed your attention to the commencement of the negotiations whereby you acquired the Bankus tract?

A. Mr. Wilson.

Q. Mr. Wilson. All right. Well, you knew that Mr. Wilson wasn't a timber broker, didn't you?

A. What?

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

Q. You knew that Mr. Wilson wasn't a timber broker? A. I knew he was.

Q. Well, he didn't have any office, did he?

A. He always said he was a timber broker and a good one. I have heard him say it twenty-five times.

Q. He didn't have any office at Gold Beach at any time, did he?

A. I don't know whether he ever had an office at Gold Beach or not. He had an office, as I understand it, called "Wilson Timber Company" at Eureka.

Q. Yes, but that was a couple of years later.

A. Well, I don't remember.

Q. Did you ever know him to have an office, to open an office [104] in Gold Beach, Oregon?

A. No, I don't remember anything about it. He told me he was going to, but I don't know whether he ever did.

Q. Well, going back to the Bankus deal, just one or two questions more. It is a fact, isn't it, Mr. Agnew, that Mr. Wilson opened up the Bankus deal and closed it? A. Yes.

Q. And handled all of the negotiations?

A. Yes, sir.

Q. And did you pay him—did you pay Mr. Wilson any compensation? A. Yes, sir.

Q. On the Bankus tract? A. Yes, sir.

Q. How much did you pay him on the Bankus tract for compensation?

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

A. Well, now on all of the deals——

Q. (Interposing): I am talking about the Bankus tract. A. Well——

Mr. Quinn: I think he ought to be allowed to answer in his own way.

Mr. Maloy: He started to talk about all of the other deals and I move that the answer be stricken.

The Court: If the answer could be confined to that particular tract I will permit it.

Q. (By Mr. Maloy): I want to know how much [105] you paid on that transaction.

A. Ten thousand dollars.

Q. Ten thousand dollars? A. Yes, sir.

Q. And how did you pay him that ten thousand dollars? A. By check.

Q. How is that? A. By check.

Q. At the time the deal was closed?

A. No, before the deal was closed. Mr. Wilson, as a rule, got his first.

Q. When did he get this ten thousand dollars that you are speaking of now on the Bankus tract deal?

Mr. Quinn: Well, I will suggest at this time that we have got a lot of checks and drafts. We have the check he is referring to here and I think it would be only fair to the witness to present him with that.

The Court: Well, if he has any independent recollection I will permit him to testify to it. If he hasn't, I will permit him to refer to checks.

Plaintiffs' Exhibit No. 4—(Continued)
(Testimony of Samuel A. Agnew.)

(Last question read by the reporter.)

A. The ten thousand dollars, well I think it was in late December of '45.

Q. (Continuing): December of 1945. Was it before the deal was consummated?

A. Yes, sir. [106]

Q. What?

A. Yes, sir, that is as I understand it was.

Q. Well, now, I move to strike that.

Mr. Quinn: We will object to that. He is explaining his answer. He has a right to complete it.

The Court: Go ahead.

A. As I remember it that was it.

Q. (By Mr. Maloy): Go ahead.

A. That was the earnest money that was paid.

Q. That was the earnest money that was paid down? A. That is what Mr. Wilson told me.

Q. He told you the earnest money paid down, the ten thousand he was getting as his commission?

A. No, he didn't tell me he was getting any commission. The price on the Bankus piece was a hundred and ten thousand dollars to start with.

Q. All right. How much did you pay for the Bankus tract?

A. Well, I think a hundred and ten thousand dollars.

Q. It went into escrow, didn't it, Mr. Agnew?

A. Yes, but I had already paid it.

Mr. Quinn: At this time I am going to ask that

Plaintiffs' Exhibit No. 4—(Continued)

(Testimony of Samuel A. Agnew.)

the witness be permitted to see his checks and what he paid.

The Court: If he can answer these things by his independent recollection, I will permit him to do so. If you get out a bunch of checks here the issue will just be confused.

(At this point there was a discussion [107] regarding recessing until Monday morning, November 14, 1949, at 10:00. The court recessed at 4:15 p.m.) [108]

Reporter's Certificate

State of California,
County of Alameda—ss.

We, Elwood L. Quayle and Mary Lou Quayle, do hereby certify:

That we were appointed official reporters in the case of Samuel J. Wilson vs. Samuel A. Agnew, tried on Thursday, November 10, 1949, at Crescent City, California, in the Superior Court of the State of California, in and for the County of Del Norte, before the Honorable Samuel F. Finley, Judge presiding, and that we reported the testimony and proceedings at said time and place and thereafter caused our shorthand notes to be transcribed, and that this is a full, correct, and complete transcript of said testimony and proceedings to the best of our ability, commencing at page one hereof and continuing to page one hundred and eight.

Plaintiffs' Exhibit No. 4—(Continued)

In Witness Whereof, we hereby subscribed our hands this 8th day of February, 1954.

/s/ E. L. QUAYLE,

/s/ MARY LOU QUAYLE.

Received in evidence October 25, 1955.

PLAINTIFFS' EXHIBIT No. 5

In the Superior Court of the State of California
in and for the County of Del Norte
No. 4060

SAMUEL J. WILSON,

Plaintiff and Cross-Defendant,

vs.

SAMUEL A. AGNEW,

Defendant and Cross-Complainant.

No. 3801

SAMUEL A. AGNEW,

Plaintiff,

vs.

SAMUEL J. WILSON,

Defendant.

No. 4061

SAMUEL A. AGNEW,

Plaintiff,

vs.

SAMUEL J. WILSON and EVA MAY WILSON,
Defendants.

STIPULATION

It Is Hereby Stipulated between the parties hereto, in the above-entitled actions, that by and through their respective counsels of record that the above-entitled actions have been and are settled and compromised upon the following terms, to wit:

I.

Samuel A. Agnew shall transfer all his right and title and interest in and to what is known as the Kepner Tract, situated in Humboldt County, California, to Samuel J. Wilson, by good and sufficient form of conveyance.

II.

Samuel A. Agnew shall convey to Samuel J. Wilson all of the right, title and interest to what is known as the Clutter Tract, situated in Township 36, Range 14, Curry County, Oregon; also all his right, title and interest in what is known as the Reid Tract, situated in Township 36, Range 14, Curry County, Oregon; also his right, title and interest to all other land owned by Samuel A. Agnew, situated in Township 36, Range 14, Curry County, Oregon.

III.

Samuel J. Wilson shall convey by good and sufficient conveyance all of the right, title and interest in what is known as the Gilbert Thorp Tract, situated in Del Norte County, California to the said Samuel A. Agnew.

IV.

All actions pending between the parties hereto shall be dismissed with prejudice and without costs, whether in the state or federal courts in the States of California or Oregon.

VI.

Each party to the above-entitled actions shall make, execute and deliver, or cause to be made, executed or delivered to the others a general release, releasing and discharging said other parties from all claims, demands or liabilities of any kind or character which either claims against the other.

VII.

The parties hereto shall make, execute and deliver to the other such other conveyances, documents or other papers that may be necessary to carry into full force and effect the terms of the foregoing stipulation.

Dated: November 14, 1949.

/s/ SAMUEL J. WILSON,

/s/ SAMUEL A. AGNEW,

/s/ C. E. H. MALOY,

/s/ C. D. CUNNINGHAM,

/s/ WM. W. SPEER,

/s/ IRWIN T. QUINN.

Received in evidence October 25, 1955.

PLAINTIFFS' EXHIBIT No. 9

In the District Court of the United States
for the District of Oregon

Civil No. 8011

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the
Estate of Sam J. Wilson, Deceased, and Jessie
Wilson,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORAL EXAMINATION BEFORE TRIAL
(At Instance of Defendant)

Be It Remembered that on the 28th day of June, 1955, at the hour of 10:00 o'clock a.m., at the office of S. A. Agnew Lumber Company, Centralia, Washington, pursuant to notice and subpoena, personally appeared before me, James R. Royse, a Notary Public in and for the State of Washington, County of King, duly appointed and commissioned to administer oaths,

SAMUEL A. AGNEW

called to testify on oral examination for the purpose of discovery before trial at the instance of the defendant:

C. E. WHEELOCK, ESQ., and
CHARLES P. DUFFY, ESQ.,

Appearing for and on Behalf of Plaintiffs;

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

RICHARD M. ROBERTS, ESQ., and
ALLEN A. BOWDEN, ESQ.,

Special Assistants to the Attorney General,
and

THOMAS R. WINTER, ESQ.,

Special Assistant to the Regional Counsel
for the Internal Revenue Service,
Appearing for and on Behalf of De-
fendant;

C. D. CUNNINGHAM, ESQ.,

Appearing for and on Behalf of Samuel A.
Agnew.

(Whereupon, the following proceedings were
had and done, to wit:)

Mr. Roberts: I gather everyone is ready. Mr.
Agnew——

Mr. Wheelock: Before we get started with this
deposition, what about objections to questions and
the admissibility of the evidence and the admissi-
bility of the deposition itself?

Mr. Roberts: Of course, all that can be objected
to at any time during the trial—the admissibil-
ity——

Mr. Wheelock: Are we going to have any stipu-
lation?

Mr. Winter: Let it be taken pursuant to the
rules applicable in this jurisdiction, with notice

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

filed in the District Court of the United States for the District of Oregon, and it is taken under the rules pursuant to notice and subpoena served upon Mr. Agnew.

Mr. Wheelock: What about the sufficiency of the questions with relation to the answers and the evidentiary rules? Are we going to have a stipulation that all [2*] objections will be reserved until the time of trial?

Mr. Winter: Yes, all objections reserved until the time of trial.

Mr. Wheelock: And as to the use of the deposition as evidence, we will object to the use of the deposition as evidence at the time of trial.

Mr. Roberts: There is nothing to prevent objecting to it.

Mr. Wheelock: That is right. We will want to object to it.

Mr. Winter: You are going to object to it?

Mr. Wheelock: Yes.

Mr. Winter: On what ground?

Mr. Wheelock: I don't think it is 100 miles.

Mr. Winter: From Portland?

Mr. Wheelock: Yes.

Mr. Roberts: Of course, that is not the rule that applies. It is 40 miles from the place of residence——

Mr. Winter: We can go into that later.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Mr. Wheelock: That is all we want in the record at this time.

SAMUEL A. AGNEW

being first duly sworn, testified on oath as follows: [3]

Direct Examination

By Mr. Roberts:

Q. Will you state your name and address, Mr. Agnew, to the court reporter, please?

A. Samuel A. Agnew, 210 West Magnolia, Centralia, Washington.

Q. And what is your occupation, Mr. Agnew?

A. Lumbering.

Q. How long have you been in the lumber business, sir? A. (Pause.)

Q. Can you give us an approximate length of time? A. Oh, 30 years.

Q. And have you been in Centralia all that time?

A. In and out, yes. My residence has been in Centralia all that time.

Q. And the name of your company is what?

A. You mean at the present time?

Q. Yes.

A. It is Agnew Lumber Company. That is the one that operates the mill, and the other company is the Eastern Railway & Lumber Company, who owns the mill, and the timber is in the name of S. A. Agnew.

Q. Mr. Agnew, did you have occasion to meet

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

a Mr. Samuel Wilson? A. Yes.

Q. When to your knowledge was the first time you met Mr. [4] Wilson, sir?

A. Well, I think it was January, 1943.

Q. Did you know of Mr. Wilson prior to January, 1943? A. I did not.

Q. Now, in 1943 how many mills did you operate? A. The one here at Centralia.

Q. Is that the only mill that you had at that time? A. Yes, sir.

Q. And what was the occasion for your meeting Mr. Wilson?

A. Well, there was a party in Chehalis who came over and said he had been negotiating with some parties in Oregon, southern Oregon, for timber, and he wanted to know if I would go down to look at it and be interested, and I told him yes, and when he came he brought Wilson with him.

Q. Who was this party in Chehalis?

Mr. Cunningham: If I can interrupt, Anderson.

A. Anderson.

Q. Your meeting with Mr. Wilson was here in Centralia, was it? A. Yes, sir.

Q. And what business did Mr. Wilson say he was in, if any, at that time?

A. Well, he said he was handling timber.

Q. Did he say where the timber was that he was handling?

A. Well, the timber he showed me, and I think

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

he said in southern Oregon. It was Curry County, Oregon. [5]

Q. You say he showed you the timber. Did you have occasion to go with him to see any timber?

A. Yes, at first I did.

Q. And how long after you had met Mr. Wilson was it that you went to see this timber?

A. Well, probably ten days.

Q. And where was this that you went to in Oregon? A. It was Curry County.

Q. Now, at that time did you have any agreement with Mr. Wilson as to purchasing timber?

A. Well, Mr. Wilson said he wanted to handle it, that he would locate the timber and he would buy it and sell it to me; that he didn't have a broker's license, and he would get his from the sale of it.

Q. Did you ever pay Mr. Wilson anything for locating the timber? A. No, sir, not directly.

Q. Now, what was the first timber that you remember Mr. Wilson located for you?

A. Well, I think the first was on what they called Lobster Creek.

Q. And do you know about when this was, sir?

A. Well, I would say it was February, 1943. That is the nearest I can say to my recollection.

Q. Now, can you give us any idea of how many different [6] transactions Mr. Wilson had in locating timber for you?

A. No, I couldn't because this first one didn't go through. He also offered to sell it to other

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

parties, and he had given them an option on it before he had us look at it, and we didn't get it.

Q. Do you know whether or not at the time it was offered to you Mr. Wilson either owned or had an option on that timber?

A. As far as really knowing, no, I don't know, but he did sell the timber to other parties.

Q. Did he tell you personally whether he had an option or owned the timber?

A. He told me he had an option on the timber.

Q. But you didn't purchase this particular tract of timber from him? A. No, sir.

Q. Do you know who did, sir?

A. It was a group in Chehalis.

Q. Do you know who they are—any of them?

A. It was Bill West and Laddie James McCutcheon, a timber cruiser.

Q. When Mr. Wilson would locate the timber, would you, yourself, go and look at it?

A. Yes, sir.

Q. And did you look at every tract before you bought it finally? [7]

A. Yes, sir, with the exception of the county timber. Mr. Wilson was opposed to that, and we sort of split over it. He didn't want anything to do with it. He opposed buying it. Later he said he didn't want to lose his prestige if he didn't have anything to do with the part bought from the county.

Q. Do you know whether or not Mr. Wilson maintained an office any place?

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

A. Oh, I think he opened an office in Eureka, but I never was in it.

Q. You never were in his office? A. No.

Q. Did you ever receive any mail from Mr. Wilson? A. Yes.

Q. Was there any particular letterhead that he used?

A. Well, there were two or three—Samuel J. Wilson Timber Company. There were several. I am not just sure of them, but they can be found.

Q. Do you know whether or not during this period after February, 1943, other than this first lot of timber that you say Mr. Wilson sold to someone else—do you know of any other tracts that were sold by Wilson to other purchasers besides yourself?

A. Well, the only other one I remember specifically was one that he talked to me about, and I went to look at it, and [8] it was very good, and he bought it himself.

Q. Did you ever purchase it, or purchase it from him, rather? A. I am not sure on that.

Q. Do you know what tract that was, sir?

A. I think he bought it. I don't know the tract. It was bought in his wife's name. I think he bought it for his wife.

Q. Would you state for the record just what your arrangement with Mr. Wilson was regarding timber?

A. Well, I won't say he located the timber, but he would get it from either hearsay or someone

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

offering it. And at first it was awfully hard for us to get a description of it. He would tell me about where it was and in whose name it was and look it up, but as far as Mr. Wilson going in and showing me the timber, he didn't. He wasn't, that is, as far as actually knowing timber—that wasn't Mr. Wilson's line. That was up to us. Then we would have a discussion and look at it, and he would say, "I can sell it to you for so much." If it was satisfactory, we would take it, and if we didn't think it was worth that, there was some dickering, and that was the way it was handled.

Q. How was Mr. Wilson to be paid for this work, sir?

A. By the seller. What Mr. Wilson paid for it was no concern of ours.

Q. Now, how long did you and Mr. Wilson continue to have this [9] arrangement?

A. Well, that I couldn't say. I don't know, but I think through 1945. That would be just my guess. I think that can be determined, but I don't remember.

Q. Now, was there any particular area, concerning the geographic area, of the states that Mr. Wilson was to work in, sir?

A. No, sir.

Q. Is it a usual practice in the course of your business for you to have dealings with people the same as you have described with Mr. Wilson?

A. Yes, a number of them.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Q. Do you remember the Gilbert Thorp tract, sir?

A. Yes, sir.

Q. Can you give us the particular details on your purchase of that tract—just what the mechanics of buying that tract were?

A. Well, it was bought just the same as the rest of it outside of the county stuff. He bought it and held it in his own name until the settlement was made.

Q. Now, Mr. Agnew, do you have at the present time the drafts that were used to purchase this timber?

A. Well, I don't have them, but I think, as Mr. Cunningham stated, they can be obtained.

Q. Do you have the checks that were issued in these timber [10] deals?

A. The drafts or checks—I think they are all available, I would judge. After they went into the court I just lost track of them, as far as that goes.

Q. And you have never seen them since the time they went in the court down there in California?

A. No, sir.

Q. And as far as you know, your attorney still has those?

A. Well, I would think so, but I don't know. There may be some of them here, but I am not sure. In fact, I never had any connection with them or line on them at all. I figured that it was a closed book.

Q. Now, as to the county timber that you de-

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

scribed, how did you happen to purchase that, sir?

A. Well, it was advertised. It had been put up before for sale, and Wilson's attitude was to stay away from it, to leave it alone, it was dynamite. So, finally, in checking it I told him I was going ahead with it, and he said, "Well, that is where we part. I don't want anything to do with it." He ridiculed the idea and brought all the pressure he could to discourage me from buying this timber, that we would be better buying clean timber. So, finally, I told him I was going ahead with it anyhow. Well, finally, he said he didn't want to be entirely let out and that he would like to be in some way associated with it. But as [11] far as handling it, I bought it and paid for it directly.

Q. Do you know how it happened the property was put up for sale?

A. The first time I don't remember, but it was put up two or three times. The first time that we bid on it, it was thrown out. They claimed there was some legal technicality. Then it was put up again, and we purchased it.

Q. Do you know how it happened the first sale was thrown out? From your own personal knowledge, do you know why it was?

A. No, I don't.

Q. Do you know from your own personal knowledge whether Mr. Wilson had anything to do with getting the county to sell this property?

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

A. I don't think so, because Mr. Wilson wasn't in favor of it in any way, shape or form.

Q. Now, when you bought this timber, did you buy it for resale or manufacturing?

A. Manufacturing. At that time our people were pretty well cut out here, and as I remember it, they had about 18 months to run, and the plan at that time was to cut it out and move the mill to Curry County, Oregon.

Q. When did you obtain the mill at Klamath Falls or Klamath County?

A. I think we took possession July 1st, 1944. I am not positive on that. [12]

Q. Did Wilson have anything to do with your purchase of this mill?

A. Well, he suggested so many that I don't know, but the mill that he wanted us to purchase was the one Simpson let go of at Klamath, and he had a lease of the Klamath Cedar Company. I forget the name. They call it the Italian mill. That is the mill that Simpson has now, and then there was another one that I don't remember the name of.

Q. Now, in the purchase of this timber did you ever agree with Mr. Wilson that he would put up any money at all? A. No.

Q. Do you know from your own personal knowledge whether he did put up any money towards the purchase of any of this timber that you bought?

A. I am sure he didn't.

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

Q. The drafts and checks that were used to pay for this timber—were they made out to Mr. Wilson?

A. We handled it in different ways. Some were made to him and some of them were made to the seller.

Q. Can you tell us what determined whether a check or draft was to be made out to Mr. Wilson or to the seller?

A. Yes, as he wanted it.

Q. As who wanted it? A. Mr. Wilson.

Q. Now, Mr. Agnew, was there ever a written agreement between [13] you and Mr. Wilson?

A. No, sir.

Q. Was there ever any definite oral agreement between the two of you?

A. Only as I have stated, that he would sell us the timber for certain prices.

Q. Now, was this agreement that he sell the timber to you and take his from the seller his suggestion or your suggestion, that it be handled that way?

A. His suggestion, and I think that was followed on each individual piece. As to the procedure covering it, there was nothing—in other words, we started with the Lobster Creek timber, that “I can sell you this for so much.” So we looked at it and had it check-cruised, and I told him we would take it. Then he said, “I am sorry, but I have given an option to a Chehalis bunch.” So he went to the Chehalis bunch and told them, so he said, if they

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

were going to exercise their option they would have to do it right away, that he had another purchaser, and they took it.

Q. Now, he would come to you at different times then with pieces or tracts of lumber, is that correct?

A. Timber.

Q. Timber. And was it your understanding that each of these tracts of timber was a separate transaction? [14]

A. Absolutely.

Q. Have you at any time during the period that you knew Mr. Wilson and were purchasing these tracts of timber paid Mr. Wilson yourself—directly paid him?

A. Well, you will find a number of checks and drafts were made out to Mr. Wilson, but it was for a specific piece of timber.

Q. Did you pay him for any services that he rendered to you?

A. No, sir.

Q. And what did you consider Mr. Wilson's relationship to you, sir?

A. Well, selling timber to us.

Q. Now, did you make or have made an independent appraisal of each tract of timber that you were purchasing?

A. Well, we would go over it. That is, generally, our logging superintendent and cruiser would, and while we didn't cruise it all, we checked it all to find out whether we considered it worth the money or not.

Q. You say "logging superintendent." Did you

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

have more than one logging superintendent during this period? A. No.

Q. What was the name of your logging superintendent at that time? A. P. R. Sherwood.

Q. Where does Mr. Sherwood live, sir? [15]

A. He is here in Centralia.

Q. Now, Mr. Agnew, I believe the record shows that there was a refund to you by Mr. Wilson of \$100,000 at one time, is that correct, sir?

A. Well, that was money that was put up that wasn't used.

Q. Now, can you describe just how this money was put up and under what circumstances it was put up?

A. Well, all that I can say is that it was put up to purchase a tract of timber, and the deal didn't go through.

Q. And that was all put up on one deal, is that right? A. Yes.

Q. Had this been paid to Mr. Wilson by one draft or several drafts?

A. As to that, I couldn't say. Sometimes there would be an overlapping. There would be in the offing two or three separate tracts.

Q. Mr. Agnew, do you have any personal knowledge of how Mr. Wilson held himself out to other lumber dealers? A. No, I don't.

Mr. Roberts: I believe that is all for the present.

(Recess.)

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Mr. Roberts: I have one further question.

Q. Mr. Agnew, at any time did Mr. Wilson suggest that your arrangement with him be put in writing?

A. No, sir, there never was any question about that. [16]

Mr. Roberts: I have nothing further.

Cross-Examination

By Mr. Wheelock:

Q. Mr. Agnew, as I understand it, you first met Mr. Wilson along in January, 1943?

A. That is as I remember it.

Q. And he was dealing with some property on Lobster Creek in Curry County at that time?

A. That is correct.

Q. And over that you were introduced to him as a prospective purchaser of that property?

A. That is correct.

Q. You went down with Sam Wilson, did you, to Curry County and went over the property?

A. I don't remember just where we met Mr. Wilson, but he went with us. That was the first trip, and he went down there and also a cruiser by the name of—it seems to me like it was Allen, but I am not sure.

Q. That transaction fell through because Mr. Wilson sold the property to these other people—to some syndicate in Chehalis?

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

A. That is correct.

Q. And at that time did you own any other property in Curry County or Del Norte County, California, or Humboldt County, [17] California?

A. No, sir.

Q. Nothing else? A. No.

Q. And what was the first acquisition of property where you took title in the southern Oregon or northwestern California area?

A. Well, I don't remember. A lot of it was juggled around so—some of it was held by the bank. There was some on Muscle Creek. Do you remember, C. D.?

Mr. Cunningham: No, I don't.

Q. Was that the so-called Rutherford tract?

A. I don't think so.

Q. Was it before the time that you acquired the so-called county timber at that September sale of 1943? A. Yes, sir.

Q. It was prior to that?

A. Prior to that, yes, sir.

Q. And did Mr. Wilson introduce you to that first piece of property that you acquired?

A. Well, now, he gave me a description of it. That is as far as it went. I don't think he ever went with me.

Q. To the property itself?

A. To the property itself, no.

Q. You went down with your logging superintendent or some [18] cruiser and went through it?

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

A. Yes.

Q. And then he handled the negotiations for the purchase of it? A. That is correct.

Q. And saw to it that the title was good and that the title insurance or abstract were issued and that the taxes were paid and so forth before the purchase price was paid?

A. That is correct.

Q. In other words, he handled the deal of making and closing the sale?

A. Well, the understanding was he would turn it over to us—turn over a good title once the price was agreed upon.

Q. Now, as I understand it, in August, 1943, Curry County put up a rather substantial amount of tax title property for sale, and you say originally Wilson was not particularly anxious that you make a deal with Curry County?

A. He was opposed to it. He didn't want anything to do with it. I think principally, of course, with our arrangement, he got his money from the seller, and, of course, on county timber there wasn't anything like that, and, also, the reason that he gave me was that the title was not satisfactory.

Q. Now, did you meet an attorney by the name of Kendall from Portland, Oregon, with relation to these various purchases [19] of property in Curry County?

A. The first time, when it thrown out, this at-

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

torney, Mr. Kendall—I think they called him Judge Kendall——

Q. He at one time had been circuit judge in Coos and Curry Counties?

A. In the two counties.

Q. That judicial district comprised of Coos and Curry Counties?

A. That is correct. And there was an attorney down there by the name of Buffington who had quite a lot to say in Curry County affairs. So this Judge Kendall, as we called him, of course, was familiar with it. So he got him to go down, and he sort of represented us in the sale. In other words, he passed on the legality, as I remember it, and the first time it was thrown out on some technicality in advertising. In one instance Mr. Buffington objected, claiming it didn't give the individual purchasers the right to bid. Judge Kendall made the remark, "The county wants to get the money out of it, and they are not retailing it; they are wholesaling it. If the purchaser wants to sell it in small tracts, all right, but the county is not in that sort of business. They haven't the machinery set up for that."

Q. You say Sam Wilson introduced you to Judge Kendall?

A. That is right.

Q. And he employed Judge Kendall to pass on the legality of [20] this proposed sale of Curry County timber?

A. Well, I hired Judge Kendall and paid him.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

As far as Curry County timber was concerned, at no time did Mr. Wilson want anything to do with it any more than, as he said, he wanted to sit in on it. The rest of it Mr. Wilson handled, but not the Curry County timber.

Q. Did you attend at this first sale that was thrown out? A. Yes.

Q. You were there personally?

A. Yes, sir.

Q. Could it be a fact, Mr. Agnew, that you didn't even attend at the first sale?

A. Well, now, I don't know what you mean by the "first sale."

Q. The first sale in August when that was thrown out. A. I attended two sales.

Q. You were there in person?

A. Yes, sir.

Q. Was Mr. Wilson there? A. I think so.

Q. Did you bid at the first sale?

A. I think so. The question came up right at the start, and we were wrangling back and forth. I know we had the figure I was going to bid, but I am not clear on it.

Q. Now, at the second sale, did Mr. Wilson attend the sale? A. Yes, sir. [21]

Q. Who bid for this county timber?

A. That I don't remember.

Q. Did Mr. Wilson bid for you?

A. Well, I don't know whether he did or whether I did. I don't remember on that. Mr. Wilson stated he wanted to establish himself there, and at that

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

time, as I remember it, he intended to open an office in Gold Beach, but I don't think he did, and he did later open an office in Eureka.

Q. Now, to refresh your memory, Mr. Agnew, do you recall when you were called as an adverse witness in the trial of these cases down in Del Norte County at Crescent City and you were being examined by Mr. Malloy, who was Sam Wilson's attorney? A. Yes, sir.

Q. And Mr. Malloy asked you this question: "Did you attend the first sale"——

Mr. Roberts: What page?

Mr. Wheelock: This is on page 55.

Q. (Reading): "Did you attend the first sale in 1943? Answer: I was there but not in the room. Question: You were not present at the sale? Answer: No, no."

A. Well, as I remember it, there were other sales. Now, if we are speaking about the sale—I didn't know I wasn't there when they had it, but I am quite sure of the two last [22] sales. I don't understand that because I certainly intended to be there. If there was any bidding for me, I certainly was there.

Q. Now, you acquired this timber at this sale in September, 1943, from Curry County?

A. I think so.

Q. Who handled the closing with Curry County of that transaction?

A. That I couldn't say. There was some changing around. We traded some with the Evans Prod-

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

ucts Company. We traded Port Orford cedar on Hunters Creek for fir, but just how the closing of it was, I don't know.

Q. Did Mr. Wilson aid and assist in closing it?

A. I think so.

Q. Now, did you purchase any further timber after this sale in September, 1943, from Curry County?

A. I think so.

Q. Who negotiated those sales?

A. Well, there were one or two pieces that I talked to the commissioners there personally about, but just how the ultimate deal was made, I don't remember.

Q. Was Mr. Wilson aiding and assisting in the consummation of those transactions?

A. Well, as I stated in the first place, he said he would like to sit in on it on account of the prestige. He would [23] like to be associated for that reason, but he still objected to it and didn't want any part in it other than that he was willing to assist. And at that time it was when he said he was going to open an office in Gold Beach and establish—just what I don't know, whether as a broker or what. That I couldn't say.

Q. Well, there were some purchases made in March of 1944—one transaction in Township 33, where the total consideration bid was \$2,044.80. Do you recall that transaction?

A. I don't remember.

Q. Wilson was down in that area of the country most all the time at that time, was he not?

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

A. Well, he was back and forth from Frisco. It seems to me like he was living down there some, but I am not sure on that. I think he lived at Redwood City or some place down there.

Q. You had a transaction on Township 33 and another one on Township 38 and another one on Township 36 in the winter and spring of 1944—three separate transactions. Did Mr. Wilson help to negotiate those transactions with Curry County?

A. On that, I don't know. After this, the group, that is, the larger bunch—I made a sort of broad application that anything that they had that was for sale, if they would let me know, I would be glad to examine it, and so [24] long as we were in there, I would like to purchase as much as we could. But how it was really worked out, I couldn't say. It is a long time ago, and I was working between the two places.

Q. Now, what was the last transaction that you had on the acquisition of timber which Sam Wilson aided in the negotiations and closing of?

A. I think it was the Gilbert Thorp timber.

Q. Do you remember the date of that transaction or the approximate date?

A. No, because Mr. Wilson held that out. He just didn't turn it over.

Q. Was that transaction before or after the purchase of the Bankus tract?

A. I couldn't say. I was thinking the Gilbert Thorp was the last, but I am not sure.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Q. Do you have any recollection as to when the Bankus tract was closed?

A. No, I don't. The records will probably show, but I don't remember.

Q. Was that in 1945 or 1946?

A. I couldn't say. I don't remember.

Q. Do you have the drafts and checks that would be evidence of the date of the closing of that transaction?

A. Of the Bankus? [25]

Q. Yes.

A. I think so.

Q. Would your books and records disclose the date of the closing of that transaction?

A. I think we had that all at the time of the trial. I don't remember, but it would certainly be in the record.

Q. Do you recall a transaction for the Powrie timber?

A. Well, there was a lot of fussing around about it, but, as I remember it, we didn't purchase it.

Q. It didn't go through. But Mr. Wilson, at the time of all that fussing around, was still in this arrangement, whatever it was?

A. Well, there wasn't any arrangement.

Q. He offered this timber to you, and you attempted to buy it, but the deal didn't go through, is that right?

A. Well, I would judge that was it because that was the way that we handled transactions.

Q. Do you recall the approximate date of that?

A. No; there was so many of them coming up

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

that never materialized. I would say that 50 per cent of them never went through. So it is confusing to try to remember back that far. I don't remember.

Q. Was that before or after the Gilbert Thorp transaction?

A. That I couldn't say. When you speak about the Gilbert Thorp, is that the one that was actually closed and we got [26] the deed? I don't quite get it.

Q. The Gilbert Thorp tract was the one where the title went to Wilson——

A. Yes.

Q. ——and that was the one in this settlement that you made with Wilson that you got the title back?

A. You see, sometimes Wilson would have the deed made out in his name, and he would transfer it to us, and sometimes they were made direct. Each one was separate, and we never knew what they were going to be until the thing was finally wound up.

Q. Would you say that the Powrie transaction that fell through—that the negotiations were in May, 1946?

A. Oh, I wouldn't attempt to say.

Q. Would you have any record from which you could determine the approximate date?

A. I doubt it very much. In fact, I don't remember anything of the Powrie deal. I couldn't say. I was still negotiating with Mr. Powrie when he died.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Q. Did Wilson introduce you to Mr. Powrie?

A. No; I met Mr. Powrie. We both had a weakness; we had some thoroughbred horses, and we would discuss some of the horses.

Q. Wilson was negotiating, though, with Powrie for this timber? [27]

A. That I couldn't say. I don't remember enough about it to know. On several occasions he would say, "I am working with so-and-so for so-and-so," and if he was, I didn't pay any attention to it.

Q. When was the last time, to your recollection, that Wilson offered or attempted to negotiate for timber which would vest in you which you would purchase?

A. Well, I don't know, but, as I remember it, the Gilbert Thorp and the Bankus—I thought they were the two last pieces. I am not sure. The Gilbert Thorp was hanging fire a long time and also the Bankus.

Q. Well, with relation to the time that the first case was filed down in Crescent City, how long before that? A. I don't know.

Q. In Cause No. 3801 in the Superior Court of California in and for the County of Del Norte wherein you and Mr. King were plaintiffs and the defendants were Samuel J. Wilson and Jane Doe Wilson, his wife, and John Doe and Richard Roe in relation to the Gilbert Thorp tract, do you recall that case? A. No.

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

Q. Did you bring a suit against Sam Wilson on the Gilbert Thorp tract to determine that he was holding the title to this property as trustee for you?

A. I don't remember. [28]

Q. You don't remember? A. No.

Q. Was Irving T. Quinn your lawyer?

A. Well, he represented us down there.

Q. Did you institute a suit against Mr. Wilson with relation to the Loft Hotel?

A. That I don't know.

Q. Did you have any negotiations with Sam Wilson wherein and whereby you and he were joint venturers in the acquisition of the Loft Hotel property and the proceeds to be gained from the sale of it?

A. Not the Loft Hotel. I think Wilson bought it. He wanted some money, and I think I put up some money for a percentage of the stock, but the details I don't remember.

Q. You did have a joint venture arrangement where you put up money and when you sold you were both going to divide the profit on the Loft Hotel?

A. It wasn't on a sale. It was a proposition that he was going to operate it.

Q. When he sold it, did you sue him to get a part of the profits?

A. That I don't know. But he had said the hotel made money, and if it did, it was probably to re-

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

cover what money I put in. I couldn't say. I don't remember.

Q. Now, you were in attendance in the courtroom down in Crescent [29] City at the time this case was first started for trial and Mr. Quinn was your lawyer? A. Well, he was one of them.

Q. And Mr. Collier Buffington was one of your attorneys? A. Yes.

Q. And Mr. Cunningham here? A. Yes.

Q. He is your regular attorney?

A. Yes, sir.

Q. Was Mr. Quinn the attorney who was going to actually try the case down there—do the actual trial work? A. As to that I couldn't say.

Q. What was the prime issue to be tried in that case—in those cases? A. I couldn't tell you.

Q. Was the question that you were there to determine whether or not there was a joint venture between you and Sam Wilson?

A. Well, there was never anything for me to——

Q. Just a minute. Answer the question. Was the thing you were there to try in Judge Finley's court in Crescent City whether there was or was not a joint venture between you and Sam Wilson?

A. That I couldn't say.

Q. You don't recall the issue they were there to try in that [30] case?

A. No, I don't remember what it was.

Q. Well, what were you doing there in court?

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

A. I couldn't say, and I don't even remember who was the plaintiffs.

Q. There were three cases, weren't there, or were there?

A. Well, that I couldn't say. There was a lot of them.

Mr. Wheelock: I think that is all.

Redirect Examination

By Mr. Roberts:

Q. Mr. Agnew, is it the general practice in the timber business for the brokers ever to be paid by the seller of a tract of timber?

A. Oh, I couldn't say on that. I think that is usually private trading.

Q. Have you had other dealings in which the seller paid the broker's fee? A. Yes.

Q. Now, on this county tax sale timber, were you always present if Wilson did any bidding for you?

A. Well, unless he did it without my knowledge.

Q. Now, was his bidding for you done at his request or your request?

A. Well, I couldn't say in regard to that. But the whole [31] thing was that I would decide what we would pay, and that was my position and I would pay no more. Now, whether Mr. Wilson did bid or not, I couldn't say. I don't remember.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Q. If he did any bidding for you, was it done at his request or did you request him to bid for you?

A. Well, so far as the Curry County stuff was concerned, he—I will put it this way: He wanted to be in on it. He was opposed to it right to the last. The last words I think he said were we would have trouble over the title, but he wanted "to be in on it," as he put it. That is, he wanted to be in on the talk for the reason he was going to establish an office in Gold Beach. That seemed to be his main interest, but he never was interested in the county timber.

Q. Now, you stated on your cross-examination that you had requested that the county notify you if they had any timber tracts for sale and that they would do so. Now, how would they notify you? Was it by direct mail or through Wilson?

A. Well, I was generally in there every week. They told me to talk it over with them and asked if I had seen it after it was put up.

Q. During this period from, I believe it was 1943, until you finally broke up, how often would you see Mr. Wilson?

A. Oh, that is pretty hard to say. He had a number of schemes, and I don't suppose—not only of timber but other [32] things, and I don't think over ten per cent of them ever materialized.

Q. Would you see him once a week or once a month, or can you give us any idea how often?

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

A. Generally, whenever he would take a notion to submit something.

Q. During the majority of the time, would he come to Centralia to see you?

A. Generally Klamath.

Q. Klamath. How much time would you say you spent at Klamath?

A. Oh, I tried to go down there once a week. Sometimes I didn't make it. Sometimes it was more. Generally, I planned to leave here Sunday morning and go down and be there two or three days and be back Tuesday or Wednesday night. I couldn't say.

Q. Now, when your difficulty with Mr. Wilson arose, did Mr. Cunningham send you to Mr. Quinn, or did you seek out Mr. Quinn on your own?

A. I don't think Mr. Cunningham sent me to him, but I don't know how I did contact him first.

Q. Now, were these suits brought actually by Mr. Quinn?

A. That I couldn't say. Of course, Mr. Cunningham was here in Washington, and there were a number of things that required—at least it looked like the best thing was to have someone who was familiar with California law, and he [33] had residence there. That is the only reason I can say. I tried to get Mr. Cunningham to handle it all, but it was too long or too far away.

Q. Now, did you ever request that Mr. Wilson locate any particular tracts of timber for you?

A. Not to my knowledge.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Q. Did you ever pay any of Mr. Wilson's traveling expenses? A. No, sir.

Q. Did you ever pay any of his office expenses?
A. No, sir.

Q. Now, in any of these deals in which Mr. Wilson was associated, in purchasing from Wilson, did you accept his judgment as to the quantity or quality of the timber?

A. No, Mr. Wilson didn't claim to know that. No, we relied on our own judgment absolutely.

Q. He would then merely find the timber, is that correct, sir? A. Yes.

Q. Did you ever accept his judgment as to title?
A. No.

Mr. Roberts: I have nothing further.

Recross-Examination

By Mr. Duffy:

Q. Mr. Agnew, I understand you had correspondence with Mr. Wilson from time to time during this period. He would [34] write to you and you would write to him?

A. He would write to me. I don't know that I ever answered one of them.

Q. Where would that correspondence be now?

A. I couldn't say. There may be some of it here. I think probably what was considered of any materiality was in the case. It probably was with the other documents at the time of the trial, but that I couldn't say for sure. I don't know.

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

Mr. Roberts: May I interrupt off the record?

(Discussion off the record.)

Q. Mr. Agnew, you entered into this settlement of these lawsuits on November 14, 1949. The record shows that was when the stipulation was signed. Was it during the year 1949 or was it later on during 1950 when these properties were conveyed back and forth between you and Mr. Wilson?

A. That I couldn't say. I got so disgusted I didn't want to have anything to do with it. You can blame the attorneys for all that.

Q. How did you treat these amounts that you paid Mr. Wilson in settlement of these lawsuits? How did you treat them in your own income tax return?

A. As far as on the income tax return, there was so much timber that was bought. A certain amount went to Mr. Wilson, and the balance remained with us. That is all [35] I can say.

Q. You didn't claim any deduction on your return for any compensation for his personal services? A. No, sir.

Q. What was the answer? A. No, sir.

Mr. Duffy: I believe that is all I have.

Plaintiffs' Exhibit No. 9—(Continued)
(Deposition of Samuel A. Agnew.)

Recross-Examination
(Resumed)

By Mr. Wheelock:

Q. When you first were acquainted with Wilson in 1943, was he a licensed broker of timber?

A. He told me he wasn't. That is all. I couldn't say.

Q. Do you, of your own knowledge, know if he was ever a licensed broker? A. I do not.

Q. You stated on your direct examination that he would find a piece of timber that he thought you might be interested in?

A. I will put it this way: He got wind of it, and whether it was in a hotel lobby or where it was, that I don't know. Then, as I said to start with, he would tell me about it, but he wouldn't even have the description. I said, "There is no use trying to do anything about it without getting the description." So he would get the description. Then [36] we would go and examine it. That is as simply as I can put it.

Q. After you had gone and looked at the timber, would you generally contact Wilson and if you were interested in it talk about the price you thought you should pay for it?

A. No, generally, he said, "I can sell you this for so much money," and then if we thought it was all right, we said so, and if not, we would make an offer.

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

Q. And he would negotiate with the people who had title to it?

A. That I couldn't say. Sometimes it was done right there. Sometimes he was high, and sometimes he was low.

Q. And if you arrived at a price that was satisfactory, would he generally attend to the closing of the transaction?

A. That is right. If he said, "Send John Jones a check or draft for so much money and put it in the bank," so far as we were concerned, that was all there was to it. How he and Jones handled it, I don't know.

Q. And you had full faith and confidence that when he said, "I can buy it for so much money. Send the money," that you would get what you were after or you would get your money back?

A. That is right.

Q. And during all this time you never paid him any compensation of any type or nature for any of these transactions?

A. No, unless it was in the purchase price where I wouldn't [37] know it.

Q. And you never paid him any expenses for traveling or motels or hotel rooms or anything of that nature?

A. No, sir.

Q. Would he at any time ever advance any money as earnest money or a down payment on one of these transactions?

A. That I wouldn't know of. He would ask for

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

it sometimes, and sometimes he wouldn't. That was one thing that was pretty much mixed up. He would put it up and think he could make the deal, but it wouldn't go through. When we started down there to start with, the plan was to buy it in the name of the Eastern Railway & Lumber Company. Right off the bat they said, "No corporation. There have been too many corporations, and we don't know who we are dealing with." So that was why it was bought in the name of S. A. Agnew.

Q. You know of no other transactions he was involved in with relation to timber than those where the titles were taken by you that Sam Wilson negotiated during this period of time?

A. Well, there was the Lobster Creek and one other. Then that was finally consummated——

Q. Yes.

A. ——and the one he bought for his wife. Other than those three, I don't remember. [38]

Q. To refresh your memory, didn't he acquire in his own individual name the title to some property in Township 36 of Curry County where the title was not merchantable? Is that the timber you are talking about for his wife?

A. No, I don't remember that. That is, I don't remember a question like that coming up.

Q. That was ultimately sold to the Double O Lumber Company at Gold Beach?

A. I don't remember.

Q. Do you remember a transaction where the

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

titles could not be made good that you couldn't go through with? A. No, I don't.

Q. The Clutter tract?

A. I think we got the Clutter tract. Whether Wilson bought it individually or not, I don't know. I had forgotten all about it, but since you mention it—there was something there. I don't know what it was now.

Mr. Wheelock: I think that is all.

Mr. Duffy: May I suggest the deposition be continued until such time as these documents which were required by the subpoena duces tecum are produced or those which are still available are produced?

Mr. Bowden: May I suggest we complete the deposition and then at whatever convenient time after you get the documents we take another deposition at your request or [39] the government's request?

Mr. Duffy: I think we should just continue it.

Mr. Winter: I don't see how we can continue this. I think we should take another one after these documents are produced. We will see if there is anything that he can produce. If he says he hasn't anything, I think he has answered the subpoena. I think we ought to take another one. It would be simpler to get out another notice if we find they can find anything. They say that they don't know if they can find anything.

Mr. Duffy: I think the plaintiffs in this case will

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

record their objection to the failure to continue this deposition until the documents which were required by the subpoena duces tecum are produced.

Mr. Roberts: As a matter of procedure, I don't know that it makes much difference whether the deposition is continued or a new one taken. I would presume you are going to want to go over these documents that are produced and from them you will determine whether or not you want to re-examine Mr. Agnew.

Mr. Duffy: Either re-examine or examine initially on matters that have not been covered.

Mr. Roberts: Yes, I understand that. Therefore, I think we are allowed to go away beyond the scope of the testimony today after it is decided whether anything [40] should be done after examination of these documents. I think, therefore, probably the better procedure would be to close it for now, and if we decide on taking further testimony, then do it at that time. It is purely a question of procedure, and, as I see it, it doesn't make any difference whether we decide, say, two months from now, that we will reopen it or set it down now two weeks from today. It is merely a question of procedure. It is going to be just the same as if we took another deposition.

Mr. Duffy: We have stated our position for the record.

Mr. Winter: Have you produced all the documents you can produce at the time set?

Plaintiffs' Exhibit No. 9—(Continued)

(Deposition of Samuel A. Agnew.)

Mr. Cunningham: Yes.

Mr. Winter: And you are going to try to find more if you can?

The Witness: That is the attorney's job, you know.

Mr. Winter: You don't have any more?

Mr. Cunningham: If you will tell me what you want—there is no use telling Mr. Agnew because I would have to do it anyway and check them out, and I will check it with Mr. Quinn down there. I understand his health is such——

Mr. Wheelock: I don't think he is practicing.

(Discussion off the record during which each of respective counsel and witness expressly waive right [41] of witness to read and sign foregoing transcript of his oral examination.)

(Witness excused.)

Certificate

State of Washington,
County of King—ss.

I do hereby certify that on the 28th day of June, 1955, at the hour of 10:00 o'clock a.m., at the office of S. A. Agnew Lumber Company, Centralia, Washington, personally appeared Samuel A. Agnew, called for oral examination before trial at the instance of the defendant;

Plaintiffs' Exhibit No. 9—(Continued)

C. E. Wheelock, Esq., and Charles P. Duffy, Esq., attorneys at law, appearing for and on behalf of plaintiffs;

Richard M. Roberts, Esq., and Allen A. Bowden, Esq., Special Assistants to the Attorney General, and Thomas R. Winter, Esq., Special Assistant to the Regional Counsel for the Internal Revenue Service, appearing for and on behalf of defendant;

C. D. Cunningham, Esq., attorney at law, appearing for and on behalf of Samuel A. Agnew;

And the said witness having been by me first duly sworn to testify the truth, the whole truth and nothing but [42] the truth in said cause, answered and deposed as appears in his oral examination hereinbefore annexed;

I further certify that the said oral examination was then and there taken down in shorthand by me, a competent shorthand reporter and a disinterested person, and thereafter reduced to typewriting by me or under my personal supervision;

I further certify that the foregoing transcript of such pretrial oral examination is a full, true and correct transcription of all the testimony of said witness, including questions, answers, statements and objections by counsel;

I further certify that the reading over by or to the witness of his said pretrial oral examination and his subscription thereto were by counsel and by the witness expressly waived; and

Lastly, I certify that I am not employed by nor related to any of the parties to said action or their

Plaintiffs' Exhibit No. 9—(Continued)

respective counsel, and am not financially interested in the event of the action.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal this 30th day of July, 1955.

[Seal] /s/ JAMES P. ROYSE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received in evidence, October 25, 1955. [43]

DEFENDANT'S EXHIBIT B

In the Superior Court of the State of California
in and for the County of Del Norte

No. 4111-P

In the Matter of

The Estate of SAM J. WILSON, Deceased.

ORDER CONFIRMING SALE OF REAL
ESTATE ON BID IN OPEN COURT

The return of the Anglo-California National Bank of San Francisco Administrator with the Will Annexed of the Estate of Sam J. Wilson, also known as Samuel J. Wilson, Deceased, setting forth its proceedings upon the sale of certain real property of said Estate in said return and hereinafter

particularly described, came on regularly to be heard this day of the 27th day of April, 1951.

It is proved to the satisfaction of the Court, and the Court finds:

The time for hearing said return was regularly set by the Clerk for this day; that notice of the time and place of said hearing has been regularly given for the period, and in the manner required by Section 1200, Probate Code;

That said Administrator with the Will Annexed gave notice of the said sale as prescribed by the Probate Code; that at such sale, regularly held on the 12th day of April, 1951, the said real property was sold to M. & M. Woodworking Company for the sum of \$450,000.00 cash, it being the highest and best bidder, and said sum being the highest and best bid; that the said sum so offered is more than 90% of the appraised value of the said property; that there is reason for the sale upon the grounds that the funds, and the income of said Estate are insufficient to pay the debts, expenses, taxes and charges of Administration, and for the further reason that the timber growing on said property is mature and should be cut, and the said property is of a sufficient value to produce for the Estate the necessary cash required as aforesaid and is less likely to enhance in value than any other property of said Estate, and upon the further grounds that it is for the advantage, benefit and best interest of the said Estate, that the said real Estate be sold; that said sale was legally made and fairly conducted; that said property was appraised

within one year of the time of such a sale; that the sum bid is not disproportionate to the value of the property sold;

Whereupon, in open Court, Humboldt Plywood Corporation, offered the sum of \$620,000.00 for the said property, which sum is in excess of 10% on the first \$10,000.00 bid and 5% on the amount of the bid in excess of \$10,000.00 more in amount than that named in said return, and the said Humboldt Plywood Corporation being responsible parties, and said bid complies with all provisions of the law, and no higher offer being made, the Court accepts the said offer and sells the said land to the said Humboldt Plywood Corporation accordingly;

It Is Therefore Ordered, Adjudged and Decreed, that the sale of said land so made in open Court to the said Humboldt Plywood Corporation, for the sum of \$620,000.00 payable as follows, to wit: \$75,000.00 upon the entry of this order, \$225,000.00 within 15 days from the date hereof; the balance of \$320,000.00 in three equal annual installments commencing the 1st day of May, 1952, together with interest thereon at the rate of 4½% per annum, said balance to be evidenced by a promissory note secured by a Deed of Trust on the hereinafter described real property, be and the same is hereby confirmed, and upon payment of the \$300,000.00 provided herein and the execution of the said Note and Deed of Trust and compliance with the terms of the sale, as aforesaid by the said purchasers, the said Anglo-California National Bank of San Francisco as Administrator with the Will

Annexed of said Estate, execute to said Purchaser a Deed conveying the said land, which is described as follows, to wit:

The South half of the Southeast Quarter, and Southeast Quarter of Southwest Quarter of Section 8;

The South half of South half of Section 9;

The entire Section 17 except the Southeast Quarter of Southeast Quarter thereof;

The East half of the Southeast Quarter of Section 18;

The West half of Northeast Quarter, and Northeast Quarter of Section 19;

The Northwest Quarter of Northwest Quarter, Southeast Quarter of Southwest Quarter, and South half of Southeast Quarter of Section 20;

The Northeast Quarter of Northeast Quarter, West half of Northeast Quarter, and East half of Northwest Quarter of Section 29;

All in Township 9 North of Range 3 East, Humboldt Meridian; all in the County of Humboldt, State of California.

Done in Open Court this 27th day of April, 1951.

SAMUEL F. FINLEY,

Judge of the Superior Court.

Certified true copy.

[Endorsed]: Filed April 27, 1951.

Received in evidence October 25, 1955.

DEFENDANT'S EXHIBIT D

827 Northeast Oregon Street
Portland 14, Oregon

July 14, 1954.

Ap-P:AA:MHB
90D-CAD

Estate of Sam J. Wilson, Deceased,
The United States National Bank of Portland,
(Oregon), Executor, and
Mrs. Jessie Wilson,
The United States National Bank of Portland,
(Oregon), Portland Oregon.

Dear Sirs and Madam:

You are advised that the determination of the income tax liability of the decedent and yourself, the surviving spouse, for the taxable year ended December 31, 1949, discloses a deficiency of \$361,-852.06, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Colum-

Defendant's Exhibit D—(Continued)

bia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant Regional Commissioner, Appellate, 827 Northeast Oregon Street, Portland 14, Oregon. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue;

By /s/ A. N. WILLIAMS,
Associate Chief, Appellate
Division.

Enclosures:

Statement

Form 1276

Agreement Form

Defendant's Exhibit D—(Continued)

Ap-P:AA:MHB

90D:CAD

Statement

Estate of Sam J. Wilson, Deceased

The United States National Bank of Portland (Oregon),

Executor, and Mrs. Jessie Wilson, surviving wife

The United States National Bank of Portland (Oregon)

Portland, Oregon

Income tax liability for the taxable years ended December 31, 1949, and December 31, 1950.

Year	Deficiency	Overassessment
1949	\$361,852.06	
1950		\$ 16,789.84

In making this determination of income tax liability of the decedent and yourself, the surviving spouse, careful consideration has been given to the reports of examination dated January 11, 1952; to the protests dated May 27, 1952; to the statements made at the conferences held on January 16, February 24, and December 11, 1953; and to the claim for refund filed for the year 1950 on December 13, 1951.

The overassessment shown herein should not be regarded as finally determined. When final determination has been made, the overassessment to the extent of the amount allowable will be made the subject of a certificate of overassessment, which will reach you in due course through the office of the District Director of Internal Revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you have fully protected yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter by filing with the District Director of Internal Revenue for your district a timely claim for refund on Form 843.

A copy of this letter and statement has been mailed to your representative, Mr. Carl E. Davidson, 1525 Yeon Building, Portland, Oregon, in accordance with the authority contained in the power of attorney executed by you.

Defendant's Exhibit D—(Continued)

Year ended December 31, 1949

Adjustments to Net Income

Net income (loss) disclosed by return (Form 1040)		\$(9,321.82)
Unallowable deductions and additional income:		
(a) Compensation	\$502,176.85	
(b) Settlement income	25,000.00	
(c) Net loss from sale of property other than capital assets	1,968.78	
(d) Medical expenses	738.20	529,883.83
		<hr/>
Nontaxable income and additional de- ductions:		
(e) Net gain from sale of capital assets	9,844.16	
(f) Net operating loss deduction ..	8,051.28	17,895.44
		<hr/>
Net income adjusted		<u>\$502,666.57</u>

Explanation of Adjustments

(a) In the year 1949 the decedent received a 70 per cent interest in certain timberland as an out-of-court settlement of a suit between Sam J. Wilson and Samuel A. Agnew. The property was received as compensation for services performed and, in accordance with Sec. 29.22(a)-3, Regulations 111, represents taxable income to the extent of its fair market value. The value of the property transferred by Agnew has been determined to be \$717,395.50 of which the decedent's interest was 70 per cent or \$502,176.85.

(b) In the year 1946 Samuel A. Agnew forwarded to the decedent the sum of \$25,000.00 for the purchase of certain timber and timberland designated as the Powrie deal. The property was not purchased but the decedent retained the cash advanced. The out-of-town settlement in 1949 provided that the decedent would retain the cash advanced. Since Agnew agreed in 1949 to the retention of the cash by the decedent, the amount represents taxable income in 1949.

Defendant's Exhibit D—(Continued)

(c) In the year 1949 the decedent reported that he had received certain assets in liquidation of a joint venture and that the cash withdrawals amounted to \$54,700.00 whereas the cash paid in amounted to \$36,180.46. The excess of \$18,519.54 the decedent treated as a long-term capital gain. He also reported as a long-term capital gain the profit resulting from the collection of an installment obligation. The obligation resulted from the sale of real property known as Patrick Creek Lodge and the gain on the collection for the year 1949 amounted to \$1,968.78. He also claimed as a deduction the amount of \$1,400.00 which was stated to be a non-business bad debt and, therefore, deductible as a short-term capital loss. In addition, the decedent reported a loss of \$4,408.61 resulting from the sale of a log pond.

The reported net capital gain and the ordinary loss were as follows:

Long-term capital gains:

Dissolution of joint venture	\$ 18,519.54
Installment sale collection	1,968.78

Net long-term gain	\$ 20,488.32
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Fifty per cent	\$ 10,244.16
Short-term capital loss	1,400.00

Net gain from sale of capital assets	\$ 8,844.16
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Loss from sale of log pond	\$ 4,408.61
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It has been determined that the decedent was not a joint adventurer with Samuel A. Agnew and that the reported gain, \$18,519.54, was not realized. Furthermore, in accordance with section 117(j), Internal Revenue Code, the gain on the sale of the Patrick Creek Lodge property must be applied against the loss sustained on the sale of the real estate used as a log pond. The deduction for the net short-term capital loss is limited by section 117(d), Internal Revenue Code, to \$1,000.00. In accordance with the above, the net loss on the sale or exchange of

Defendant's Exhibit D—(Continued)

property other than capital assets is reduced to \$2,439.83 and the net loss from the sale or exchange of capital assets, as provided by section 117(d), Internal Revenue Code, is limited to \$1,000.00.

(d) The amount of \$738.20, represented in the return of the decedent and yourself, the surviving spouse, as medical expenses, is disallowed since such expense does not exceed 5 per cent of the adjusted gross income.

(e) For details of adjustment, see item (c), above.

(f) As a result of a net operating loss for the year 1950, a net operating loss deduction is allowable for the year 1949, computed as follows:

Net loss for 1950 as determined		\$ 13,668.54
Long-term capital gain—section 117(j) at 100 per cent:		
Installment obligations	\$ 19,191.86	
Sale of stumpage	17,911.40	
	<hr/>	
	\$ 37,103.26	
Less: Loss of 15 per cent interest on timber at 100 per cent	32,486.00	
	<hr/>	
	\$ 4,617.26	
Disallowance of capital loss in 1949..	1,000.00	5,617.26
	<hr/>	
Net operating loss deduction..		\$ 8,051.28

Computation of Tax

Net income adjusted	\$502,666.57
Less exemptions	1,200.00
	<hr/>
Income subject to tentative tax	\$501,466.57
One-half of such income	250,733.29
Tentative tax	202,987.29
Tax reduction—\$12,020.00 plus 9.75 per cent of \$102,987.29	22,061.26
	<hr/>
Balance of tentative tax	\$180,926.03

Defendant's Exhibit D—(Continued)

Income tax liability—		
\$180,926.03 times 2		\$361,852.06
Liability disclosed by return		
Original account No. 8621724		None
Deficiency in income tax		\$361,852.06

Year Ended December 31, 1950

Adjustments to Net Income

Net income disclosed by original return		
(Form 1040)		\$ 45,924.63
Unallowable deductions and additional income:		
(a) Legal fee		4,000.00
Total		\$ 49,924.63
Nontaxable income and additional deductions:		
(b) Capital gain		63,593.17
Net loss adjusted		\$(13,668.54)

Explanation of Adjustments

(a) The net income of the decedent and yourself, the surviving spouse, as reported in the return, is increased by the amount of \$4,000.00, representing a legal fee deducted in error.

(b) For the year 1950 you reported a net gain of \$127,186.33 on the sale or exchange of capital assets held for more than six months. This gain you computed as follows:

Interest sold to B. F. Howser	\$ 16,500.00	
Cost	0.00	\$ 16,500.00
Sale of stumpage	\$ 89,557.02	
Cost	0.00	89,557.02
Installment sales collections:		
Patrick Creek Lodge	\$ 2,031.15	
Double O Lumber Co.	19,098.16	21,129.31
Total		\$127,186.33

Defendant's Exhibit D—(Continued)

Year Ended December 31, 1950

Explanation of Adjustments (Continued)

It has been determined that the basis of the interest in timber sold to Howser and the timber sold as stumpage are the fair market values at the date of the settlement of the litigation. Those values are as follows:

Interest sold to Howser	\$ 48,986.00
Stumpage	71,645.62
	<hr/>
	\$120,631.62
	<hr/> <hr/>

Since the interest sold to B. F. Howser was acquired on November 14, 1949, and sold on May 9, 1950, the property was held for less than six months and the loss is held to be a short-term capital loss. The stumpage was held for a period of more than six months and, in accordance with section 117(k)(2), Internal Revenue Code, is considered to be a long-term capital gain. In accordance with the above, the net capital loss is computed as follows:

Interest sold to Howser	\$ 16,500.00	
Cost or other basis	48,986.00	
	<hr/>	
Short-term capital loss		\$ 32,486.00
		<hr/> <hr/>
Sale of stumpage	\$ 89,557.02	
Cost or other basis	71,645.62	
	<hr/>	
Long-term capital gain		\$ 17,911.40
Installment sales collections:		
Patrick Creek Lodge	\$ 2,031.15	
Double O Lumber Co., as now determined	17,160.71	19,191.86
	<hr/>	<hr/>
		\$ 37,103.26
		<hr/> <hr/>
Fifty per cent		\$ 18,551.63
		<hr/> <hr/>
Net capital loss		\$ 13,934.37
		<hr/> <hr/>

Defendant's Exhibit D—(Continued)

No part of the net capital loss of \$13,934.37 is deductible, since section 117(d), Internal Revenue Code, provides that losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the income of the taxpayer or \$1,000.00 whichever is smaller.

Computation of Tax

Net loss adjusted		\$ (13,668.54)
Income tax liability		None
Liability disclosed by return:		
Original account No. 9079003	\$ 14,671.60	
Supplemental account		
No. 10-300006-51	2,118.24	16,789.84
	<hr/>	<hr/>
Overassessment in income tax		\$ 16,789.84
		<hr/> <hr/>

Received in evidence October 25, 1955.

DEFENDANT'S EXHIBIT N

In the Superior Court of the State of California
in and for the County of Del Norte
No. 3801

SAMUEL A. AGNEW,

Plaintiff and Cross-Defendant,

vs.

SAMUEL J. WILSON,

Defendant and Cross-Plaintiff,

JANE DOE WILSON, His Wife; JOHN DOE
and RICHARD ROE,

Defendants.

DEPOSITION OF SAMUEL J. WILSON

Be It Remembered that pursuant to stipulation on file in the above-entitled action, the deposition of

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Samuel J. Wilson, defendant and cross-plaintiff, was taken before Hon. George T. Berry, Jr., Justice of the Peace in and for Del Norte County, State of California, on Friday, July 23, 1948, at the hour of two o'clock p.m. in the court room of the Superior Court of the State of California, in and for the County of Del Norte. There also appeared at said time and place Irwin T. Quinn, attorney for plaintiff and cross-defendant, and William W. Speer and C. E. H. Maloy, attorneys for defendant and cross-complainant.

The witness was by said magistrate thereupon duly and regularly sworn to testify to the truth, the whole truth and nothing but the truth in the matter of his deposition, and the taking thereof proceeded, Irwin T. Quinn conducting the examination on behalf of plaintiff and cross-defendant, and William W. Speer and C. E. H. Maloy on behalf of defendant and cross-plaintiff.

The taking of said deposition was commenced on said 23rd day of July, 1948, at two o'clock p.m. and was completed on July 24, 1948, at 12 o'clock noon.

The said deposition in respect to the testimony given and all matters incident to the taking of the same were by Margaret Duffy thereupon taken down in shorthand and transcribed into typewriting, under the direction and supervision of said magistrate and delivered to the magistrate for sub-

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

mission to the said witness for perusal, correction and signature.

The testimony of said witness is as follows: [2*]

SAMUEL J. WILSON

having been regularly sworn, testified as follows:

Cross-Examination

By Mr. Quinn:

Q. Your name is Samuel J. Wilson?

A. Yes.

Q. Where do you reside, Mr. Wilson?

A. Well, I reside here in Crescent City; part of the time in Grants Pass. This is my home.

Q. This is your home, Crescent City? You are the defendant and cross-plaintiff in this action; and I show you this document, Mr. Wilson.

A. Well, I probably read most of it but not all of it because Mr. Isaacs has been handling it.

Q. I was not asking you about that. This subpoena duces tecum was served on you by Theo H. Hunt on the first day of June, 1948.

A. I believe it was.

Mr. Quinn: We introduce into evidence this subpoena duces tecum as Plaintiff's Exhibit No. 1.

I would like to introduce the stipulation in Action No. 3801, this action, filed in the Superior Court of the County of Del Norte—the stipulation signed by myself, Irwin T. Quinn, attorney for

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Samuel A. Agnew, and William W. Speer, attorney for Samuel J. Wilson, filed here on July 16, 1948, as Plaintiff's Exhibit No. 2.

Q. (By Mr. Quinn): Did your attorney make a demand for a bill of particulars in action on account? [3]

Mr. Maloy: If you know.

Mr. Quinn: In which he admitted service on the 30th day of June, 1948?

The Witness: What is this?

Mr. Quinn: Demand for a bill of particulars. I will ask to have introduced in the record of this deposition a document entitled "Demand for Bill of Particulars in Action on Account" signed by myself as attorney for Samuel A. Agnew and filed in the proceedings in this case on June 30, 1948, by Emma Cooper, county clerk, by Elizabeth Griffin, deputy, and the admission of service of same in these words "I hereby admit service of the within demand for a bill of particulars this 30th day of June, 1948. William W. Speer, attorney for defendant and cross-complainant." I wish to have that document appear in the record by reference as Plaintiff's Exhibit No. 3.

Mr. Maloy: For the record I will make the objection that it is incompetent, irrelevant and immaterial.

Mr. Quinn: All right.

Q. Have you furnished us with a statement of

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

the amount of money expended by you in maintaining an office? A. No, I have not.

Q. Or in employing secretarial help?

A. I don't think that would concern anybody; I have nobody else paying that bill but me.

Q. Or in maintaining a telephone; you have not furnished us [4] a statement on that?

A. I will tell you, Mr. Quinn—Mr. Isaacs as you know has been in the hospital; he is taking care of it for me. I tried to get him to come up and he is not able to come up.

Q. Or any cruising or costs for cruising any lands or timber?

A. I have not got a statement and I won't have until he is able to be about.

Q. In other words you have not furnished us with a statement of any of the things that were demanded?

A. I am not in a position to furnish them; but I can furnish you most anything else.

Q. You have not furnished us anything up to this time? A. No.

Q. Now, according to your complaint you entered into this agreement with Mr. Agnew on February 15, 1943?

A. Well, I would not say it was February 15th.

Q. Well, have you a copy of the complaint?

A. Which complaint is that?

Q. Well, your last one, your cross-complaint; you allege in Count 3 that on or about the 15th day

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

of February, 1943, counter-plaintiff contracted with plaintiff and counter-defendant in regard to the purchase, according to your cross-complaint of certain timber lands in the State of Oregon and California—when was it you contacted him?

A. I contacted him in May in Centralia; I don't know how that got in there. [5]

Q. In May in Centralia; what date in May?

A. Along in the middle of the month.

Q. Whereabouts in Centralia?

A. At his office.

Q. That was in what year? A. 1943.

Q. Who was present? A. Both he and I.

Q. No one else present? A. No one else.

Q. Was there anything put in writing on that date? A. No, sir.

Q. Then you allege in your cross-complaint, count 11, that on or about the first of March, 1943, defendant and plaintiff entered into an agreement to purchase certain privately owned timber land in the States of California and Oregon. Where did that take place?

A. When I first discussed it with him I told him about timber down south and he and Mr. Sherwood and I made a trip down there to look it over.

Q. When was that?

A. Well, about the middle of May.

Q. You allege in your complaint that on or about March 1, 1943—

A. I didn't read it very carefully.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Where did that conversation take place?

A. In Mr. Agnew's office the first time I met him.

Q. That was the first time you met him?

A. Yes.

Q. Was that the time you entered into this agreement?

A. No, not right at that time, that moment.

Q. When did you enter into the agreement? [6]

A. After my trip down south.

Q. Well, what do you mean by down south?

A. Well, I went down and looked at that timber down at Lobster Creek and the Phillips tract; I am speaking of the time I made the trip from Centralia to look at the timber.

Q. Did you at that time offer him the Lobster Creek property subject to an option that was already outstanding? Was there any writing in regard to that?

A. No, I told him that if the other fellows didn't take up the option I would work out a deal with him.

Q. Were any of the agreements or understandings you had with Mr. Agnew reduced to writing?

A. No; verbal.

Q. This was all verbal?

A. Except some letters.

Q. Now, you received certain money from time to time from Mr. Agnew?

A. That's right.

Q. Did you keep a bank account here?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. Well, I did here and down in Eureka and Gold Beach.

Q. You keep bank accounts in Eureka and in the Gold Beach bank? A. Yes.

Q. Which bank in Eureka?

A. Bank of America.

Q. Do you keep any accounts down in San Mateo?

A. Well, I had an account down there but that was an inactive account.

Q. What bank?

A. I have forgotten; I have not banked there for five years; it was my own personal account there. I [7] didn't do any business with that.

Q. What bank did you deposit these moneys you got from Mr. Agnew in?

A. In a great many instances I didn't deposit them at all; they were the exact amount of money.

Q. You never deposited the exact amount?

A. I say they were the exact amount of money—drafts drawn for the timber.

Q. Well, you got the money?

A. Yes, I got the money he paid for the timber.

Q. Have you got an account of the moneys you received from Mr. Agnew?

A. The fact of the matter is that in most instances I drew on Mr. Agnew for exactly the amount of money it took to handle the deal.

Q. That isn't answering my question. Have you got an account, statement?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. I have not got it with me; it has got to be made up. The reason I didn't make it up because at the time, all the time we were doing business Mr. Agnew was handling all the stuff up there, and he got my letters on everything.

Q. I am asking you now—have you got any real book account?

A. I have not got it complete; I was unable to give a book account until I know how much Mr. Agnew advanced me.

Q. This was Mr. Agnew's money you were handling? A. Well, I—— [8]

Q. You received certain checks?

A. That's right.

Q. From Mr. Agnew; what did you do with those checks? A. Paid them out for timber.

Q. How did you pay them out?

A. Well, the checks in most cases were the exact amount.

Q. Have you got a statement with you?

A. No, I have not.

Q. Did you bring your bank statement?

A. No, I have not.

Q. That subpoena duces tecum required you to do that, didn't it?

A. Well, unfortunately Mr. Isaacs has been under the weather. He was supposed to get this stuff together for me but was unable to do so.

Q. This thing has been pending for a long, long time. A. I know.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Haven't you got with you your bank books?

A. No.

Q. You were asked to bring them.

A. I didn't see Mr. Agnew's bank book this morning.

Q. Have you brought your cancelled checks?

A. I have some of them.

Q. Can we see them?

Mr. Maloy: Which particular check do you want. If you specify the check and Mr. Wilson has it we will produce it. You can't go on a fishing expedition after all of the checks.

Mr. Quinn: Checks pertaining to these transactions in timber.

Mr. Maloy: Which transactions? [9]

Mr. Quinn: All right, Mr. Wilson. You purchased some land from a man by the name of Stubrud in Portland.

A. That was a draft drawn on Mr. Agnew for that amount of money; eleven thousand and some odd dollars.

Q. Did you pay Mr. Stubrud for that?

A. I paid Mr. Leib who was handling the deal.

Q. Who is Mr. Leib?

A. A man in Portland.

Q. What does he do?

A. He is in the real estate business; he handled the deal for me.

Q. You sent him \$11,000?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. It involved \$11,500, as I recall; I don't remember exactly; 11,000 or 11,500.

Q. Have you got the check there?

A. No, I drew a draft on him and he paid the draft; I paid the taxes and drew a draft on him for the difference.

Q. Through what bank?

A. I don't recall through what bank; anyway the transaction was completed.

Q. A bank in Portland?

A. It might have been.

Q. Your own draft?

A. I drew the draft on him for whatever amount of money it was; I think around 11,000 dollars.

Q. Have you got the draft there?

A. No, I have not got the draft; I think it was drawn in Gold Beach as I recall. But it might have been in Portland. But [10] the amount—you have got the amount and the letters and everything.

Mr. Quinn: No, we have not. We are getting these amounts from you.

Q. What are Mr. Leib's initials?

A. Howard Leib.

Q. What firm is he connected with?

A. He is in business for himself.

Q. Have you his address?

A. I couldn't give it to you offhand now.

Q. Will you get it for us?

A. I can. I got all the letters and correspond-

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

ence pertaining to that deal if you want to see them.

Q. Where are the letters?

A. They are here.

(Hands file to Mr. Quinn.)

Q. (By Mr. Quinn): How did you pay Mr. Stubrud for his timber. A. I paid him cash.

Q. You paid him cash? A. Yes.

Q. You gave it to him in cash?

A. Yes. Well, I don't know whether cash or bank draft.

Q. Well, if you gave a bank draft you would have that back wouldn't you?

A. Well, I bought a bank draft; I either gave a check or bank draft.

Q. All right, where is your cancelled check for that transaction? A. I haven't got any.

Q. Have you got a draft? [11]

A. I am not asking anything on that; why Mr. Agnew got deed for \$11,500, didn't he? I am making no claim on it.

Q. That's all right; did you pay this man up in Portland?

A. I think I paid him in Portland.

Q. You were there personally?

A. I was there or Leib was—he paid him or I paid him. Five years ago.

Q. You can't produce either a check or a draft, Mr. Wilson, in payment?

A. Yes, I have a draft right there; \$9000 and

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

something for taxes. I think that is in there; I am not positive.

Q. Is this the draft you mean?

A. I am not positive; I have to read the letter over to see if it fit in all right; there are some taxes on there.

Q. Here is one.

A. No, that isn't a draft; here is another one; I think this one is on the Reid deal, this one here; at any rate he got the deed for that amount of money.

Mr. Quinn: We admit we got the deed. I hand you an advice document.

A. Well, now, I made these deals as they went along—I didn't have any time; as I bought the timber he paid me for it and that was the end of it.

Q. You paid, according to this, \$9036.24?

A. I don't say I paid it.

Q. This is a draft—Sam J. Wilson. [12]

A. Well, it is a long time ago; I don't recall exactly what that detail is.

Mr. Quinn: I ask to have this introduced in evidence.

The Witness: I wouldn't introduce it in evidence; I don't know what it is myself; it fits some place.

Mr. Quinn (Reading): National Bank of Commerce, Centralia, Washington. Marked paid 10-21-1943, First National Bank of Portland, Main Branch, Portland, Oregon, drawer S. A. Agnew Lumber Company, Centralia, Washington, through

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

your bank under the heading Documents—drafts, M. J. Wilson, D.T.D. 191743, with warranty deed attached—amount 9036.24.

The Witness: I don't think that fits in there, between you and I, I think it is another deal.

Mr. Quinn: "Mailed to Samuel J. Wilson, Portland Hotel, Portland, Oregon. Dated 9/2/19——

The Witness: Mr. Quinn, you see the letter there, there's a difference in taxes—1900 and some odd dollars—that doesn't fit in there.

Mr. Quinn: There's another draft numbered C102714, Centralia Branch, National Bank of Commerce, Centralia, Washington, marked paid September 30, 1943—First National Bank of Portland, Portland, Oregon, drawee S. A. Agnew, Agnew Lumber Company; through your bank documents—drafts, Sam J. Wilson—1146.36—Samuel J. Wilson, Portland Hotel. Were those two drafts concerning the same deal? [13]

A. I don't think they did. I just put **them** in there. I can't figure where they fit in; there were a lot of other ones at that same time.

Q. This money that is indicated in this draft, dated September 17, 1943—\$9036.24—did you get that money? A. Sure I got it.

Q. You got the money? A. Yes.

Q. Did you deposit it in your bank account?

A. I don't know what I did with it or where I deposited it.

Q. You have no check?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. I presume that is a completed transaction; he got the timber and I got the money.

Q. But you have no check or draft that you gave to Mr. Stubrud for the purchase of that timber from him? A. No.

Q. Did you deal with anybody beside Mr. Leib in that? A. No.

Q. Did you ever deal with Mr. Stubrud?

A. I bought through Mr. Leib and he bought it from Mr. Stubrud. That is, he made the deal.

Q. You never had any direct contact with Mr. Stubrud? A. Well, I don't know that I did.

Q. Up in Curry County there was another transaction relating to the Reid land?

A. I also had that, too.

Q. With whom did you deal in that transaction?

A. Mr. Reid.

Q. Where did he live at the time?

A. He lived in Portland, Oregon? [14]

Q. How much did you pay him?

A. Same way, by draft.

Q. I am not asking that now; I am asking you how much did you pay Reid?

A. I don't remember; it was a completed transaction.

Q. You don't remember a completed transaction?

A. Mr. Agnew got the draft and paid it; got the deed. The deed went along with it; I don't know where that enters into this picture.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Mr. Quinn: Well, we are going to find out. You got a draft from Mr. Agnew for \$8549.14?

A. I will show you——

Mr. Maloy: I suggest you let Mr. Quinn ask you what he wants.

Q. Have you got that draft, Mr. Wilson?

A. Well, I drew on Mr. Agnew for that amount of money, as I recall—what's the amount of that draft?

Mr. Maloy: \$9033.24——

Mr. Quinn: December 16, 1943—where were you when you got this money?

A. I was living in my suitcase; I might have been most any place.

Q. This draft is payable to you?

A. \$8549.14. Well, it says Reid property.

Mr. Quinn: That simply has been written on there by somebody. A. Well, that's what it is.

Q. What did you do with that money when you got it? [15] A. I paid it to Mr. Reid.

Q. Did you deposit it in your bank account?

A. I think I gave him exactly what that called for.

Q. Have you a check?

A. No, it was a draft.

Q. Have you got the draft?

A. No, I have not got the draft.

Q. Got no draft? A. No.

Q. What bank did you draw on?

A. Well, I might have drawn it on any bank; I always figured these were completed transactions.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Probably some of us have different ideas. You have no check you paid to Mr. Reid?

A. I have a letter.

Q. Then you didn't draw a check on your own account for it? A. Want me to get the letter?

Mr. Maloy: Wait until he asks for something.

Mr. Quinn: We are asking you about the money; you are handling it.

A. Well, I paid Mr. Reed for the property and Mr. Agnew got the deed.

Q. How did you pay Mr. Reed?

A. I don't recall; 5 years ago.

Q. You don't know whether you wrote him a check? A. No, or whether I gave him a draft.

Q. Did you give him this draft?

A. I think that's the one; there was some taxes on top of that. That is less the taxes.

Mr. Maloy: How much is that?

A. \$8549.14. [16]

Q. (By Mr. Quinn): You never endorsed this draft over to anybody?

A. Well, how do you know I didn't.

Q. Your signature is not on there, is it?

A. Any time you get a draft with my signature on I didn't draw it; it must be Mr. Agnew; I don't recognize that.

Q. You can't tell us how you paid Mr. Reed?

A. I have correspondence showing Mr. Reid was paid. Want to see it?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. (By Mr. Quinn): Yes. Now, I will ask you again how you paid Mr. Reed for this timber?

A. I don't know how I paid him; I paid him.

Q. You don't know how? A. No.

Q. Now, did you tell him in that transaction to take \$6358.85 from the draft and to send you the balance?

A. That's right; to be sent to me, Box 847, Redwood City, California. That's right.

Q. What was that balance? Was that the difference between \$8549.14 and \$6358.85?

A. I don't know; it is 5 years ago.

Q. What did you do with the balance?

A. How would I know what I done with the balance—think I got a mind that I could remember 5 years?

Q. The difference between those is \$2190.29?

A. I think that was taxes.

Q. You paid that for taxes; how did you pay the taxes—who did you send the check to? [17]

A. I paid them in Gold Beach.

Q. How did you pay them?

A. Mr. Agnew had the tax receipt and everything.

Q. I am not asking that. You said you paid it. Did you give the tax collector a check or cash?

A. I don't know; it was mostly all drawn in drafts. I paid some by check and some I did not; but they are paid; that's the main thing. He got the deed.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Have you got the check?

A. No, but he got the deed, didn't he?

Q. I am asking you if you paid these taxes and if you have a check whereby you paid the taxes on this Reid property in Curry County?

A. Well, I would not say I did, but they are paid.

Q. That is all you know; that they are paid. Did you deposit that balance of \$2190.29?

A. I don't know what I did. All my business transactions were made as we went along from deal to deal.

Q. I would like to make a reference to this letter? (Reading): "Portland, Oregon, 14th December, 1943, Branch Canadian Bank of Commerce, Portland, Oregon. Dear Sir: Referring to the draft for \$8549.14 which I have today left with you drawn on S. A. Agnew, care of the Agnew Lumber Company, Centralia, Washington—when this draft has been paid, please pay David Reid from the proceeds \$6358.85—6358 85/100, balance to be sent me at Box 847, Redwood [18] City, California, after deducting my charges. Deed in favor of S. A. Agnew, covering property in Curry County, Oregon, to be attached to draft. Yours truly, Release to S. A. Agnew only upon payment of sight draft."

Q. You wrote such a letter? A. Yes.

Q. Did you handle the deal known as the Frick deal? A. That's right.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. Property in Curry County?

A. That's right.

Q. There were a number of people involved in that deal? A. I don't remember; a number.

Q. Do you remember getting a deed from the Fricks on or about July 28, 1944?

A. Well, I don't—

Q. One deed on that date—

A. I had several deeds from them before I got one that was good.

Q. With whom did you transact that deal?

A. Oh, there were three or four Fricks, a man by the name of Smith and a woman, I can't think of her name offhand.

Q. They live around San Francisco?

A. That's right.

Q. Who did you have the particular transaction with—who did you conclude the deal with?

A. I don't just recall.

Q. You don't know which one it was? What did you pay them for that property?

A. With draft.

Q. I am asking how much?

A. I paid them for that property?

Q. Yes.

A. I paid them about—I have forgotten exactly what [19] it was; I can dig up a record on it.

Q. You have forgotten the amount. There were quite a number of acres involved?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Yes, I know; quite a lot of people's timber, too.

Q. What is your best recollection of what you paid?
A. I haven't any idea.

Q. Have you got any record on it?

A. I probably have some place.

Q. Some place—what do you mean by that?

A. I have got a record.

Q. How did you pay them?

A. I paid them on—I don't know how I paid them.

Q. You don't know whether you paid them by check or draft?

A. I got the timber and got title insurance and that's all I was interested in.

Q. Did you have to put up money anywhere?

A. I put up some money on a down payment; I have forgotten the amount.

Q. You don't know how you paid it now?

A. No.

Q. Does it refresh your memory that there were revenue stamps of \$19 on the deed?

A. I don't recall that.

Q. Have you got an entry in any of your books anywhere of the amount you paid for that timber?

A. Well, I probably have.

Q. You didn't bring with you any accounts, any book accounts or entries?

A. No, I didn't think it was necessary. [20]

Q. Well, have you got them?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. I think maybe we have.

Q. Where are they?

A. I don't know; I would have to look them up; some place in my possession.

Q. If you paid it by check; that check would show; you haven't got a cancelled check, have you?

A. Probably, if I paid it by check.

Q. You probably have it, but you didn't bring it with you?

A. I told you some of the checks as far back as that I haven't got.

Q. What did you do with them?

A. I don't know.

Q. Destroy them?

A. No, not necessarily; a man don't keep them after—that transaction was a completed transaction.

Q. Did you bring your bank book from the Bank of America here in Crescent City?

A. No; neither did Mr. Agnew bring his.

Q. As far as I know he was not requested to bring his bank book. You have your bank book?

A. I think so; I haven't got them that far back.

Q. You have your bank statements?

A. Not that far back.

Q. Have you got any documents or letters from Frick about the amount?

A. Might have some place.

Q. Have you got them with you? A. No.

Q. Any correspondence between you and them

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

about the deal?

A. Well, I didn't have very much correspondence. I went down there personally and called on them. [21]

Q. You were asked to bring in letters and correspondence that was held between yourself and the owners of these lands that you acquired. Have you got any?

A. I have not got them with me. I don't know whether I can find them or not; that's a long time ago.

Q. Why didn't you bring them in?

A. I couldn't find them.

Q. Did you make a search for them?

A. I did.

Q. And you couldn't find them. Now, you bought some timber from some people by the name of William Flood?

A. That's right.

Q. Where do these people live?

A. Gold Beach; I bought some timber on a five or seven-year lease.

Q. How much did you pay for that?

A. As I recall it was around one thousand, but I forget.

Q. How did you pay that?

A. Paid it through Mr. Newhouse.

Q. Who is he?

A. Mr. Newhouse lives at Gold Beach.

Q. You paid these people \$1000?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. Or thereabouts; I have forgotten just what it was.

Q. How did you pay it?

A. I don't remember.

Q. Pay by check or draft?

A. I don't know.

Q. Have you got any returned check that you paid to the Floods? A. I doubt it.

Q. Do you think you paid it by draft?

A. I don't know. [22]

Q. Have you got an entry in your books of that deal?

A. Just a rough entry of what I had to pay for income tax.

Q. Where is it?

A. I couldn't tell you where it is right now; I am just going by memory; if you want to check with Mr. Newhouse——

Q. You want us to check it?

A. I presume you want to check it up.

Q. What we wanted you to do was to bring these things into Court——

A. Well, I haven't got them.

Q. You have no record then of the Flood deal?

A. I know it is about a thousand dollars.

Q. Have you a book entry?

A. No, I can't find it; I had some, but I can't find it. I never kept a real set of books——

Q. You never kept a record of these checks?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. From the time I moved down here and started at Eureka I kept a record—I kept books.

Q. When did you come to Eureka?

A. I came down there in 1944.

Q. Where is the record you kept?

A. In Eureka. Isaacs has that.

Q. You knew that this deposition was going to be taken for some long time?

A. I know; let's get this clear. I didn't have the amount of money; I relied on—when I took these documents up [23] there these deeds and everything was wrong. I did not have anything else to check from up until that time. I think I made that clear. I have been trying for a long time to get the exact amount of money Mr. Agnew gave me.

Q. You got the money and checks from Mr. Agnew? A. Yes.

Q. Checks that you cashed?

A. That's right.

Q. And that you put into your bank account or done something with it?

A. Most of those checks were for the exact amount of the timber; made out to me, paid over to the county; if I bought a piece of timber for \$800 Mr. Agnew sent me the check and I took it up and gave it to the county clerk and sent him a deed for it; all these small checks, that's what it amounted to.

Q. Here is a check for \$5000, September 30, '44, made out to you; what did you do with that check?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. I just don't recall what that check was for; I never had the check down there unless it was something pertaining to Klamath cedar.

Q. I am asking what did you do with the check?

A. I couldn't say offhand; it says "Miller tract"; I deposited it on the Miller tract.

Q. You endorsed it? A. That's right.

Q. On the Miller tract. Here's a check of March 29, '46—\$5000 made out to yourself and endorsed by yourself; what did you do with that money? [24]

A. Paid some taxes with it.

Q. Did you deposit the money in your bank account? A. Yes, I did; must have; here it is.

Q. Have you got the check that you paid?

A. I got quite a lot of checks.

Q. Will you produce what checks you have got?

A. I will produce some of them; what date was that?

Q. This last one was March 29, '46.

A. I don't seem to have that; here is one of '45; when was that dated?

Q. This last was March 29, 1946? A \$5000 check.

The Witness: I have no record of it here, but I do know on several occasions Mr. Agnew made a check out to me and I deposited to the account of Klamath Cedar Company; I think maybe that's one of them.

Q. You think now you deposited this check?

A. I don't know; I can't say.

Q. Why would Mr. Agnew give you a check to

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

go and deposit in Klamath Cedar Company account?

A. I don't know; he gave me some to deposit in Klamath Cedar.

Q. He could write a check himself——

A. He sent them to me and told me to go do it for him.

Q. Have you any letters to that effect?

A. No, but I think I can show you some of these checks were deposited in the Klamath Cedar Company account.

Q. He gave you his own check to go deposit in his own account?

A. That's right; maybe he didn't give it to me here; maybe [25] he gave it to me somewhere else.

Q. Do you know where you were on March 29, '46?

A. No.

Q. Now, do you remember a transaction with Thomas A. Barnum and a deed to lands in Curry County?

A. Yes.

Q. I think it was a one-third interest; where was Mr. Barnum then?

A. I don't recall Mr. Barnum.

Q. What is it?

A. It was a timber tract but whether Mr. Barnum had anything to do with it or not, I don't know.

Q. What did you pay him?

A. That deal went through Brown and Brown. In Portland.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. What did Brown and Brown do?

A. They had the timber; I bought it from them.

Q. Where are they located?

A. Well, they are timber cruisers. They are well known.

Q. Have you a real estate operator's license in California? A. No.

Q. How much did you pay Mr. Barnum?

A. Oh, around \$10,000.

Q. For his one-third interest?

A. No, for all of it.

Q. How did you pay it?

A. Is that up in Curry County?

Q. Yes.

A. Well, he got the whole thing and got title insurance on it.

Q. You mean the Reynolds deal went along with that? A. That's the whole thing.

Q. Who did you pay the money to?

A. Brown and Brown.

Q. How did you pay it?

A. I think Mr. Agnew paid it direct; sent me a check and paid it direct. [26]

Q. You think Mr. Agnew sent the check direct?

A. I think he did pay it direct through Jim Bettingfield—he was Mr. Agnew's attorney; he handled the deal.

Q. Jim Bettingfield?

A. Yes, of Coos Bay.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. You don't think you issued any check or draft for that? A. I don't recall.

Q. Did you enter that in your books?

A. I probably did in my own book; I didn't have an office then.

Q. Where is your own book?

A. I don't know; I wish I knew; I could tell you something about it.

Q. You lost that, too?

A. No, I don't think it is lost; it will show up maybe.

Q. You say the money was paid to Brown and Brown?

A. Well, either to Brown and Brown or Bettingfield was in the middle some place and title insurance was paid and the transaction was closed as far as I was concerned.

Q. You have no record or any entry concerning that deal?

A. Well, I think you can find out from Brown and Brown what it was.

Q. You are the man that sued us here?

A. I am not making any claim on that.

Q. You are familiar with the Elmer Bankus deal? A. Very much.

Q. Up in Curry County? A. That's right.

Q. How much did you pay Mr. Bankus? [27]

A. One hundred thousand.

Q. How did you pay him? A. Draft.

Q. Your own draft?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. No, draft on Mr. Agnew; I paid him five thousand in cash.

Q. Get a receipt for it? A. Yes.

Q. When did you pay him \$5000 in cash?

A. About the first of December.

Q. Did you get that amount back from Mr. Agnew? A. I don't think I did.

Q. Here's a sight draft, Bank of America, Crescent City—\$96,340? A. That's right.

Q. You got that draft? A. Yes.

Q. What did you do with it—the money?

A. It was drawn directly on the bank here; the bank got the money, I didn't.

Q. Was that put into your account?

A. No; paid direct by Mr. Agnew; Mr. Agnew paid the drawer when it was presented to him.

Q. How did you pay Bankus?

A. Got it out of that money; the bank paid him.

Q. He issued a check or something to Mr. Bankus?

A. Didn't have to; that draft went through and when the draft was paid he got his money.

Q. This draft was not made payable to Mr. Bankus?

A. Well, check with the bank down there; they paid it; it was in escrow down there. [28]

Mr. Maloy: What's the date of the check?

Mr. Quinn: January 4, '46.

Q. Have you any record or account of that Bankus transaction?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Yes, I got all the contracts and everything; I made the deal.

Q. Have you any entries of cash received or cash paid out?

A. I have cash paid out—\$5000.

Q. Have you got your check on that?

A. I think I have.

Q. Mr. Wilson, did you pay any of the taxes on the Bankus property?

A. No, that was taken out of the \$100,000.

Q. How much—do you know how much was taken out?

A. No, quite a bit; about \$30,000 or more.

Q. There was current taxes—you are speaking now about delinquent taxes against the property?

A. I don't recall; I think they were paid up to date at the time.

Q. Going back to the Frick deal—did you pay any taxes on that?

A. I can't recall whether any taxes paid on that. My client since may have paid them; I don't know.

Q. Did you pay any taxes on the Barnes and Reynolds deal? A. Yes; I paid the taxes.

Q. How much?

A. Oh, couple of thousand.

Q. How did you pay them?

A. I don't just recall.

Q. Did you pay by check?

A. I couldn't say. [29]

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. You paid it personally in the tax collector's office in Curry County?

A. I don't know; yes, I am sure I paid it; I am inclined to think Mr. Agnew sent me two checks and one was for taxes.

Q. That Mr. Agnew gave you the check?

A. I am inclined to think that; I am not sure.

Q. Have you got the tax receipt?

A. No, I gave everything to Mr. Agnew when I delivered the deed to him.

Q. You delivered it to Mr. Agnew. Now, you acquired some property in Curry County from an Arthur Reid Smith, Trustee under the will of Kate M. Smith in your own name.

A. Oh, I bought that and I sold it. Where was it?

Q. In Curry County, Township 36.

A. How much land was it?

Q. Oh, I don't know; a number of 40's here; looks like 200 acres, if I am right.

A. I don't recall that name.

Q. Have you still got that timber?

A. No, I sold 480 acres to Mr. Agnew.

Q. Was this Smith deal part of it?

A. No, I bought it from the bank, National Bank of Commerce; I would have to look into that Kate M. Smith.

Q. That deal—the deed was dated April 17, '45. You got another deed about that time from a Lillian Prinkham.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Oh, that was a different transaction altogether.

Q. That was a different transaction but you got these deeds for that property?

A. Yes, that's right.

Q. When did you acquire the Smith property?

A. I don't know; it was not the Smith property. It belonged [30] to a man by the name of Clutter.

Q. Was that in the Clutter deal? A. Yes.

Q. There were a number of deeds gotten in that—from Jesse L. and Charles E. Clutter?

A. Yes.

Q. Have you still got that property?

A. Yes, I bought it and paid for it.

Q. How much did you pay for it?

A. \$2000.00.

Q. You got that at the same time that you got the Reid property?

A. No; I did not; I was 2½ years buying that; in fact, I am still buying it.

Q. The Clutter property still stands in your name? A. That's right.

Q. And you claim that as your own?

A. Absolutely.

Q. How did you pay Mr. Clutter?

A. Paid him with draft.

Q. Have you got a copy of the draft or have you the returned draft?

A. I will look; I got it some place.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. Did you buy some property from a Margaret Ward Riddell?

A. Yes, I bought that a couple of months ago.

Q. The deed was made out to you?

A. Sure.

Q. You still have that property?

A. Still have.

Q. How much did you pay her for that?

A. \$4000, I think.

Q. How did you pay it? A. Cash.

Q. Paid her in cash? A. Yes.

Q. No check or draft? [31]

A. I don't know whether I paid her by check or draft; I know I paid her.

Q. Going back to the Bankus deal, was there a cruise on that? A. Yes, some cruise on it.

Q. Pay anybody for a cruise?

A. Yes, paid about \$1,000.

Q. To whom did you pay that?

A. A man by the name of Harvey.

Q. What's his first name? A. B. J.

Q. Where does he live?

A. Lives in Portland. B. J.

Q. Did he give you a receipt for that?

A. Yes.

Q. May I see it, please? (Receipt produced.)

Q. What's Mr. Harvey's address?

A. I don't know; he is a timber cruiser.

Q. You don't know; he is a timber cruiser. Have you got the cruise?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Why, I think I mailed the cruise to Mr. Agnew. It was a piece of timber sold to a man by the name of Kane; we were selling to him.

Q. You haven't got the cruise he furnished you?

A. No, I told you I mailed it to Mr. Agnew.

Q. To Mr. Agnew?

A. Yes, at the time we were making the deal.

Q. You say this was a cruise on the Bankus timber?

A. That's right.

Q. The deed of the Bankus timber was recorded, was made January 23, 1945—and this statement was dated March 19, '46.

A. That's right.

Q. And it reads—Mr. Sam Wilson, time, expenses, Crescent [32] City trip from February 26 to March 19, inclusive, B.J.H. 17 days at \$25—\$425. Meals, cabins, hotels, \$187.95—less \$100 check—total amount March 19, '46, \$512.95. (Signed) B. J. Harvey. Endorsed, paid in full March 21, '46. B.J.H.

And another one, March 19, '46, Mr. Sam Wilson. Time and mileage on Crescent City trip February 26 to March 19, inclusive, L. S. Holmes, 19 days, \$12.50, \$237.50—729 miles, 23c a mile to March 19, '46, \$281.24. Who is L. S. Holmes?

A. He is a compass man.

Mr. Quinn: You made out a check to B. J. Harvey—\$794.19, on March 24, '46, signed Wilson Timber Company—Sam J. Wilson. Another check dated March 6, '46, pay to the order of B. J. Harvey, one

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

hundred—signed Wilson Timber Company—Sam J. Wilson. Marked paid.

Q. You kept an account in the Wilson Timber Company, didn't you?

A. Well, this was a matter where we were making a deal with a man by the name of Kane. We cruised a piece of timber up there and it was at Mr. Agnew's request, the cruise was.

Q. I thought you said that was in reference to the Bankus deal?

A. It is a part of the Bankus timber.

Q. You have an account here in the Wilson Timber Company?

A. Well, I just paid the bill.

Q. I am asking you if you have a bank account in the name of the Wilson Timber Company?

A. Yes. [33]

Q. You also have a bank account in your own name? A. No, I don't.

Q. Is that the only account you carried here in the Bank of America, Crescent City Branch?

A. Yes.

Q. In what name did you carry your bank account in Gold Beach? A. In my own name.

Q. The one in the Bank of Eureka?

A. Wilson Timber Company.

Q. Which bank is that in?

A. Bank of America.

Q. In what name did you carry the bank account in San Mateo? A. My own name.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Which bank was that?

A. I have forgotten the name. It was not San Mateo; it was down in Palo Alto.

Q. In this deal with Margaret Ward Riddel, who did you deal with?

A. With her attorney.

Q. Who was he?

A. I have forgotten the name.

Q. Did you send a check to her?

A. No, draft.

Q. You have the draft?

A. No, I haven't the draft.

Q. What became of the draft?

A. I don't know as that concerns you.

Q. I wouldn't ask you a question unless I felt it did. Where is the draft you paid?

A. I don't know where the check is.

Mr. Maloy: The bank has probably got it; don't they keep them?

Mr. Quinn: We are supposed to have them here. You are supposed to have anything here that pertains to this business. [36]

Q. There was a deal known as the Miller timber in Del Norte County? A. Yes, sir.

Q. Who did you deal with in that?

A. Mr. Miller.

Q. How much did you pay him for that timber?

A. \$20,000.

Q. How did you pay him? A draft?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. Mr. Agnew sent me a check for that made out to Miller.

Q. In addition to that check was there other money paid? A. Yes, taxes.

Q. How much did you pay on taxes?

A. I have forgotten offhand.

Q. Did you pay them? A. I did.

Q. Have you got the tax receipts?

A. I don't know whether I have the tax receipts in full or not.

Q. You haven't any record on the Miller deal?

A. Only what I could get at the court house.

Q. Did you enter the amount in your books that you paid for taxes on the Miller property?

A. Mr. Isaacs has a record on that.

Q. Have you a record anywhere, an accounting of the amount of money you paid out on taxes on any of the properties that Mr. Agnew later acquired? A. I have quite a lot of them.

Q. Have you a statement?

A. I have not got a complete statement because he has not been able to make it up. [37]

Q. Where is Mr. Isaacs?

A. He just got back from the hospital day before yesterday. He is in Eureka now.

Q. How long has he been your accountant?

A. For 2 or 3 years; 2 years.

Q. Then if you paid any taxes on the Miller timberland you haven't got any receipt or any check?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Well, I can very easy take it off down there because it shows I paid the taxes.

Q. You knew this was coming up; why didn't you prepare that account?

A. Well, Mr. Quinn, you know in the first place I didn't know exactly how much money was spent and I tried to find out from Mr. Agnew for a year and a half and he tried to find out from me; then he told me he couldn't do anything until he got that.

Q. Nevertheless you had his money?

A. I had some of it, yes.

Q. Do you know how much money you got from him?

A. Oh, I would say roughly—I couldn't give you the exact figure.

Q. Have you got an account somewhere that you kept, a ledger account, of the various amounts of money you received from him?

A. I think in most cases you will find each record speaks for itself for each transaction. [38]

Q. How much altogether in checks did you get?

A. I don't know; you can look them over; I didn't add them up.

Q. You haven't any account of it there?

A. I have no accurate account. I have a few drafts in my pocket.

Q. I am confining you to checks and not drafts. Have you a record anywhere of the amount of checks?

A. That he paid me?

Q. That he paid you.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. No, I think Mr. Isaacs has.

Q. Those checks were deposited in your account?

A. Well, I would say they were or else paid out; sometimes I got a check for the exact amount and I paid it over. I wrote and told him I had a piece of timber say for \$801; these are all for county timber I bought in Curry County at \$5 an acre——

Q. You would turn it over?

A. I either gave them the check or turned it over to them or deposited it myself, but I paid it.

Q. You gave them your check?

A. I either paid it myself or took the check myself and turned it over to them.

Q. You referred to a deal for \$801.

A. That would be on 160 acres Curry County timber as near as I could figure. [39]

Q. Who did you buy that acreage from?

A. The county.

Q. You paid that yourself—bid it in?

A. After the sale was made up there I picked up quite a bit of timber for us for the same price. All turned over to Mr. Agnew.

Q. How did you pay the county on this \$801 deal? A. I may have given them a check.

Q. Is this the check you got from Mr. Agnew on that? A. What date is it?

Q. February 11, '44—\$801.

A. That would be about it, yes.

Q. That would about it?

A. That was the price up there—\$800 a quarter.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. This check shows it is endorsed by you?

A. That's right.

Q. Nobody else put it through the bank?

A. That's right.

Q. Could the county put it through?

A. (Looking at check): Then I evidently paid the county for the land and got this check for myself after I paid them.

Q. How did you pay the county?

A. I don't know how I paid them; I paid them or I wouldn't get the land.

Q. Have you any check showing you paid the county for that timber?

A. Well, the record is up there; the county knows what they sold it for.

Q. We know that. Have you got a record somewhere where you [40] paid that?

A. I presume so.

Q. But you haven't got it with you?

A. Well, I haven't got it with me.

Q. You bought a piece of timberland here in Del Norte County from Henrietta Woodruff?

A. That's right.

Q. How much did you pay her for that?

A. I couldn't tell you; it was a section of land I paid \$5,200 for.

Q. You paid her \$5,200?

A. For the section of land; not hers; there were three other quarters all at the same time; that in-

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

cluded one of the Hights—which one of the Hights——

Q. Was the Beckstead property involved in that?

A. Seems to me it was—what's that part of it Mr. Puter——

Mr. Quinn: We are asking you. There's a deed here from Henrietta Woodruff to Mr. Agnew August 30, 1945—how much did you pay her for that?

A. Well, I can't tell you offhand because I bought the four on the same date and I forget the exact amount; it was all entered in one transaction—\$5,200.

Q. How did you pay it?

A. I think I paid it by check.

Q. Have you got that check?

A. Haven't got it with me.

Q. How much did you pay to Mrs. Woodruff?

A. I don't know what part Mrs. Woodruff got of it; the whole thing was \$5,200. [41]

Q. There's another deed from Frank J. Haight? And May Haight, his wife, dated August 30th?

A. That's part of it.

Q. How much did you pay to Mr. Haight?

A. I couldn't tell you; I paid \$5,200 for the whole business they are all in the one family.

Q. Maybe; but separate deeds?

A. That's true.

Q. What did you pay Mr. Haight?

A. I don't recall.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Have you got any record of it?

A. No, but he got paid.

Q. Only that you paid him. A deed from Letsy Beckstead—Cassidy—Packard—Haight; How much did you pay all these folks?

A. I entered it all as one transaction.

Q. Who did you give the check to or the money to? A. Well, Mr. Puter engineered the deal.

Q. You were paying out the money?

A. That's right.

Q. How did you pay it? A. I don't recall.

Q. Have you got a record of it?

A. Yes, I have a record of it.

Q. Would you produce it?

A. I haven't got it with me.

Q. Did you pay any taxes on those tracts of timber? A. I believe I did.

Q. Do you know how much they were?

A. Couldn't tell you off hand. I just have this jumbled up mess here.

Q. Did you pay that to this tax collector here in Del Norte? [42] A. That's right.

Q. Do you know how much it was?

A. No, I couldn't say.

Q. How did you pay it; by check?

A. I don't remember; presume I paid it by check.

Q. Have your account books anywhere an entry on that? A. Of the \$5,200?

Q. Yes. A. Yes, I have a record of it.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Have you got that with you?

A. No, I have not; I have very little with me except the actual transactions as I have them in the file there. I had no way of making up a statement.

Q. Do you keep any ledger account?

A. Mr. Isaacs kept one for me.

Q. Did he keep these accounts up every day?

A. No, he only came down once a month.

Q. He came up about once a month?

A. Or two months.

Q. He put down what you told him?

A. He followed through the records, I presume.

Q. Did you turn over data to him when he came so he could make his account up when he came?

A. I think I gave him everything he needed.

Q. If you turned over some records to him from which to make up your account, when these individual deals went through you must have kept a record of that.

A. I know that that record was all in one piece—\$5,200.

Q. What records did you turn over to Mr. Isaacs? [43]

A. Everything I had.

Q. Well, now—everything I had——

A. I know; my memory is pretty good.

Q. Did you turn over checks?

A. He took everything from my account.

Q. Did you turn over the drafts? A. Yes.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Did you turn over any book accounts to him that you kept yourself? A. Yes.

Q. Mr. Isaacs has these book accounts you kept yourself?

A. Well, he has them, or they are over in my office what he has not got.

Q. Either there or in your office; where is your office now?

A. Grants Pass. I was unable to present it myself because I don't know enough about it; he was going to finish it up but didn't get around to do it.

Q. If you have some of these records over in your office in Grants Pass he has not got them then?

A. Well, I don't know what he has got; I left that entirely up to him.

Q. What kind of book do you keep your records in? A. Regular ledger.

Q. Where is that?

A. Well, he has either got it or it is in Grants Pass; he was over there and took sick and didn't finish it up.

Q. When was he over there?

A. He was over there about a month ago. [44]

Q. Is this ledger you speak about that you kept your records in—do you keep other data in it—records besides each deal with Mr. Agnew?

A. Oh, yes; what in particular do you ask about there now?

Q. Do you keep your records in more than one book?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. No; I don't know; he has kept my books for me, but I don't know exactly; I am not a book-keeper; I don't think Mr. Agnew is either.

(At this time Mr. Maloy presents receipt asked for in Miller matter; \$20,000. Found in Mr. Wilson's file.)

Q. There was a deal with Frank W. and Lucy E. Reynolds—deed dated October 8, '47, to Samuel A. Agnew. Did you handle that deal?

A. In '45?

Q. In '47. October 8, '47. Frank W. and Lucy Reynolds.

A. Yes, I think I know the transaction.

Q. Did you handle that deal? A. Yes.

Q. How much did you pay Mr. Reynolds?

A. Well, I couldn't tell you offhand; I think \$1250.

Q. How did you pay him?

A. Well, I don't know how I paid him; by check, I think. Have you got another Reynolds one there?

Q. Yes; one of September 4, 1945.

A. Well, I paid the taxes on that for '45-'46—\$246.95.

Q. You mean on this deal—this September 4, '45? A. Yes.

Q. How did you pay these taxes?

A. Paid them by check. [45]

Q. Have you got the check?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. I haven't the check; I have a statement.

Q. Have you got a record of it? A. Yes.

Q. An account?

A. I imagine so. Maybe I have a check. I will look. Yes, I have one here; this is made out to F. W. Reynolds for \$246.95.

Q. Is that for the purchase price of timber?

A. That's for taxes.

Q. What did you pay Mr. Reynolds for the timber?

A. I think I paid him \$1500, plus the taxes.

Q. Have you the check you paid him?

A. No, not with me.

Q. How did you pay him?

A. I don't know how I paid him; he got his money. I have to look that up later.

Q. Do you know anything about a deal here—a tax deed—Leo Dressler, tax collector of Del Norte County, deed dated October 7, '47, to S. A. Agnew—have you any recollection of that deal?

A. No, I had nothing to do with that, I don't think. What date is that?

Q. October 7, 1947. Here's a deed—E. W. Borcharding—April 1, '46? A. Yes.

Q. Did you handle that transaction?

A. Yes, sir. I got a check for it here.

Q. Whom did you pay?

A. Paid it to Mr. Borcharding.

Q. How much? A. \$1500.

Q. Have you got a check for that?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. I have; paid it to California Veneer [46] Company.

Q. That was the purchase price for that timber?

A. Yes.

Mr. Speer: What's the date of the check?

A. February 27, 1946.

Mr. Quinn: Did you pay any other monies on that deal?

A. Well, I have to go through these tax records down there. If the money was received from me I paid them.

Q. Have you got a record of that transaction?

A. This one here.

Q. In your book?

A. I imagine there is; there's a check here for it.

Q. Outside of the check?

A. Well, I think so.

Q. Did you pay any taxes on that property involved in that deal?

A. I think the taxes were paid on that.

Q. Did you pay them?

A. I think he paid them.

Q. You mean Mr. Agnew?

A. No; Mr. Borcharding; he is one of the owners of the California Veneer; it is in his name, but I paid California Veneer.

Q. Did you have a transaction with Emery Mitchell and his wife who signed a deed to Mr. Agnew?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Yes, I went over to the sale and bought those claims.

Q. I am asking you about the deed from Emery F. Mitchell and his wife? A. That's right.

Q. Did you pay them?

A. No, I didn't pay them.

Q. Did you deliver a check to them?

A. No.

Q. To whom?

A. I delivered a check to Trinity County.

Q. How much was it?

A. Oh, three thousand and some odd [47] dollars.

Q. Have you got the check?

A. That's the balance; I got a letter over there. I had to send them a draft for that; they didn't take anything but a draft.

Q. A receipt dated April 2, '44—received from Sam J. Wilson \$2000.00.

A. There was more than that.

Q. That's what it says on here.

A. That's the balance.

Mr. Quinn: I will read what this says: April 2, 1944, received from Sam J. Wilson \$2000.00 part payment on tax deeded property; \$1350 due plus advertising \$6.50, total \$1356.50, pmt. 960 acres Hyampon district.

Q. How did you pay that?

A. Paid it with draft.

Q. Have you got the draft?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. No; but I sent them a draft for it, bank draft.

Q. Can you get the draft?

A. I could if I went to the bank, I presume.

Q. That draft would be down in the bank—your own draft, was it?

A. No, I bought a bank draft.

Q. That's what I mean.

Q. Mr. Wilson, did you have a transaction with several people by the name of Andrewsen and Kane—in Humboldt County?

A. Oh, I bought a piece of timber from them.

Q. 160 acres? A. Yes.

Q. Who did you deal with in that?

A. I forget.

Q. How much did you pay them?

A. I don't remember that.

Q. You have no recollection how much you paid them? A. No. [48-49]

Q. The date of the deed was November 27, 1945.

A. I know it was more than \$2000.

Q. You know it was more than two thousand. Would it be that much—I notice revenue stamps \$3.30? A. Well, I don't remember.

Q. Then you paid them \$3000?

A. I don't remember.

Q. But you do remember you paid them more than \$2000? A. Well, as I recall.

Q. How did you pay them?

A. I don't recall that.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Did you give them a check—one of your own checks? A. I don't recall.

Q. Did you pay them by draft?

A. I probably did, the final payment.

Q. Or did you pay them by cash?

A. No, I always used a draft.

Q. Then you either paid it by draft or check?

A. That's right.

Q. Were there taxes to be paid on that?

A. I have forgotten.

Q. Did you draw on Mr. Agnew for that?

A. Yes, I think I drew on him for \$7500 or something for what I bought for him down there.

Q. That is you drew?

A. Yes, there were other pieces there, too.

Q. Well, there are two deeds from the Andrews, both dated on the same date—November 27, 1945. You drew on Mr. Agnew for \$7500 to cover that?

A. I don't remember whether that is the amount or not. I drew \$7500; I was to buy that stuff I bought; I have forgotten [50] the number of pieces.

Q. For the two pieces, how much did you say?

A. I don't know.

Q. How much did you pay for this section?

A. I had a deal with him; he was to pay me \$2000 a quarter for what I picked up down there.

Q. Two thousand a quarter?

A. That's right; I didn't buy very much for him.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. Then if there were 4 quarters you would have paid \$8000? A. That's right.

Q. That is your best recollection now? That's what you paid to Kanes and Andrewsens for their timberland?

A. There's another one in there, too. Maggie Bowersox.

Mr. Quinn: That is here, but I didn't understand that had anything to do with the Kane and Andrewsen.

The Witness: How much was the Kane and Andrewsen all together—how much acreage?

Mr. Quinn: One deed calls for 240 and the other for 320 acres. How much did you pay them for that?

A. I don't recall what I paid them for that; I know there was a lot of taxes there to pay.

Q. You stated a while ago you paid \$2000.

A. I told Mr. Agnew I would sell them to him for \$2000 each if I found anything good.

Q. You told Mr. Agnew you would sell to him?

A. I had somebody else do the buying.

Q. On the Kane and Andrewsen?

A. On about 4 quarter sections. [51]

Q. Now, then, you didn't deal with Kane and Andrewsen yourself?

A. Well, I had some correspondence with them, but I don't think I concluded the deal with them.

Q. You didn't conclude the deal? A. No.

Q. You paid Andrewsen and Kane yourself?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. I don't remember when that transaction took place.

Q. You don't know whether you paid them by check or draft? You think you paid them \$8000?

A. I don't say I paid them anything. I turned them over to Mr. Agnew; that was my deal with him.

Q. You got \$8000 from Mr. Agnew?

A. That's right; that's what I recall.

Q. What I want to know now—what you paid Kane and Andrewsén for that same timber?

A. I don't remember what I paid them.

Q. Who was that that helped you?

A. Bill Kaye.

Q. He was the go-between between you and Kane and Andrewsén? A. That's right.

Q. You paid Andrewsén and Kane \$2000 on forty? A. What—\$2000, on 40?

Q. Yes.

A. I didn't say I paid them \$2000. I don't know what I paid them. But I sold it—my understanding with Mr. Agnew—he was to pay me \$2000. When I looked over some of it I didn't like it so well, so I didn't buy any more. However, what he got was pretty good claims—worth five times what he paid for them. [52]

Q. You bought that from Kane and Andrewsén then?

A. No, I was working with Bill Kaye and his brother-in-law and a couple more worked on it.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Brother-in-law of whom? A. Kaye's.

Q. You don't know his name?

A. I don't think it makes any difference what I paid for it. I am telling you I sold it to Agnew for \$2000. He could take it or leave it.

Q. Then here was a tract of timberland you did buy yourself for yourself?

A. This piece here?

Q. Yes.

A. No, I didn't buy it for myself; I bought it for him; it went direct to him when I got it.

Q. You say you bought it; you turned around and sold it?

A. That was the understanding I had with him. He wanted some of that pine down there and that's what I was trying to get for him.

Q. Mr. Agnew had nothing to do then so far as the payment of the money to Kane and Andrewsén went? A. No, he paid me.

Q. So with your own money you paid Kane and Andrewsén? A. Yes.

Q. You didn't use any of the Agnew money?

A. None whatever. I made a deal I would sell them to him. I wouldn't say he didn't—he sent me some money for me to buy it with. I told him I was buying it for \$2000 a [53] quarter; that's what I sold it for.

Q. You mean you sold it yourself to Agnew?

A. Yes; these fellows all made money on it.

Q. You bought some timber from Maggie Bow-ersox? A. Same thing applies to that.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. How much did you pay Mrs. Bowersox?

A. I don't recall that either.

Q. You don't recall; that was 170.59 acres. Did you sell that to Mr. Agnew?

A. Yes, sir.

Q. What did you get for that?

A. \$2000.

Q. You got three?

A. \$2000 from Mr. Agnew.

Q. What did you pay Mrs. Bowersox?

A. I don't recall.

Q. How did you pay?

A. I don't recall that.

Q. Pay her by check?

A. I don't recall how; that's an entirely separate deal.

Q. Did you pay it by draft?

A. I don't remember how I paid it.

Q. Did you deal with Mrs. Bowersox yourself?

A. No, I never saw Mrs. Bowersox; I may have had correspondence with her.

Q. You did it through correspondence?

A. Well, either that or they went over to see her directly, I have forgotten.

Q. After you got that timber from Mrs. Bowersox you turned around and sold it to Mr. Agnew?

A. That's right.

Q. For three thousand?

A. For two thousand. [54]

(At this time adjournment was taken until Saturday, July 24, 1948, at ten o'clock a.m.)

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Saturday, July 24, 10:00 A.M.

(All parties being present, the interrogation of Samuel J. Wilson was continued as follows.)

Mr. Quinn: Mr. Wilson, did you get some property, acquire the title to it in your name from Gilbert Thorpe Land Company? A. I did.

Q. That was on about the 24th of May, 1946?

A. Well, before that, I think.

Q. By the way, you still have these lands in your name? A. That's right.

Q. You received from Mr. Agnew a draft dated March 21, 1946, for \$5000?

A. I just don't recall that draft.

Q. Wasn't that money given to you, Mr. Wilson, for the purchase of that Thorpe property?

A. It was given to me with the idea of purchasing the Thorpe property.

Q. With the idea of purchasing the Thorpe property. There was one of April 3, 1946, for \$15,800? A. Yes.

Q. Was that given to you for the purpose of purchasing the Thorpe property?

A. At the time it was given to me for that purpose, but other [55] arrangements were made.

Q. You received the money represented by these two checks? A. Yes, I did; they are signed.

Q. What did you do with this money?

A. I kept it.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. You have got it now?

A. Well, I have got it where I can get it.

Q. You never returned it to Mr. Agnew?

A. No, I had no reason to return it to Mr. Agnew.

Q. You also have the title to these lands?

A. That's right.

Q. You have never executed a deed to Mr. Agnew for them?

A. We made another kind of deal.

Q. You know the address of Mr. Sturburd?

A. No, I don't.

Q. You haven't got his address?

A. No. In fact, I never met Mr. Sturburd.

Q. You had a deal—there was property known as the Kepner property in Humboldt County?

A. Yes, that's right.

Q. Who did you deal with in that transaction?

A. Brown and Brown.

Q. Of Portland? A. That's right.

Q. They are real estate brokers?

A. They are timber people.

Q. What did you pay the Kepners for that property? A. Fifteen thousand dollars.

Q. Was there any taxes to be paid on that?

A. I think not.

Q. How did you pay that? A. Draft.

Q. You paid by draft?

A. Drew on Mr. Agnew for \$15,000.

Q. Did you get the draft yourself?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. Well, I think I have it. [56]

Mr. Maloy: What was the date of that transaction; the deed was recorded in July, 1945?

Mr. Wilson: \$15,005.00 (producing draft).

Q. (By Mr. Quinn): Brown and Brown got a commission out of that deal? A. Yes, \$750.

Q. Who paid Brown and Brown?

A. The bank.

Q. Was it paid out of this draft?

A. Yes, paid out of that draft.

Q. Yes; the draft calls for \$15,000 and pay commission of \$750 to Brown and Brown?

A. That's right.

Q. You said you paid it; that was the Kepner draft?

A. I paid the Kepner draft and the bank paid them \$750.

Q. Where did you get the money to pay Mr. Kepner's draft? A. Mr. Agnew.

Q. You turned over one of the drafts you got from Mr. Agnew?

A. No, I think it was drawn direct, as I recall.

Q. You think it was drawn direct?

A. Yes; made to the bank, as I recall it.

Q. If it was made to the bank out of that you got \$750—— A. I didn't get 750 cents.

Q. Out of that amount of money you paid \$750 to Brown, out of the \$15,000 that came from Agnew?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. It was understood with Brown; Brown made the deal and got his commission.

Q. Did you pay any commissions to any others in all these [57] deals?

A. No, not on that one, I didn't.

Q. I mean on any of the other deals we discussed here? A. Well, in some cases I did.

Q. Do you know which cases now?

A. Oh, I couldn't—there's a number there—about 30 of them. I couldn't tell you how they were all made.

Q. What other commission houses did you deal with beside Brown and Brown?

A. I didn't deal with any of them; bought most of it myself; he represented the people that owned the timber and naturally he would get a commission; but he got it direct from the bank; not from me.

Q. Brown and Brown got commissions on other deals, didn't they? A. Yes, they did.

Q. What other deals?

A. I think that Runnell Tract was one.

Q. How much did they get out of that?

A. I don't know.

Q. Did you pay them out of the money—

A. That was all done through Jim Bennefield. He handled that deal for an estate in the east through Brown and Brown.

Q. In the Reid deal was there a commission paid to them?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. Well, there was a little; Mr. Reid was handling the deal for an estate in the east and he received some couple of thousand dollars.

Q. Mr. Reid received his commission?

A. That's what he got out of it; I have forgotten the exact amount. [58]

Q. Well, Mr. Reid sold some timber; he made some deeds?

A. He didn't own all the timber in his name; there were several estates interested in it.

Q. You say outside of what he got for his interest in the land he got a commission of \$2,000?

A. Thereabout.

Q. Which Reid is that?

A. I have forgotten his name; R. A., I think it is; I am not sure.

Q. Where does he live?

A. Well, I don't know whether he is still living or not. He was a very sick man the last I knew. He used to live in Portland. Resides down in California some place.

Q. His name is D. Reid or David?

A. That's right, David.

Q. He signed the deed. I think we went into it yesterday—one for 440 and one for 320 acres. Now, it is your contention, outside of that, what he may have got out of these deeds, he also got \$2,000?

A. That's right.

Q. Who paid him the \$2,000? A. I did.

Q. That was for a commission on the other?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. It was over \$2,000. I have forgotten what it was; expenses he had going east and getting the deal lined up.

Q. How did you pay him the \$2,000?

A. I think I paid him by check.

Q. One of your own checks?

A. I guess so; I am not sure.

Q. Have you got that check with you?

A. No.

Q. Do you know where it is? [59]

A. As I told you yesterday, Mr. Quinn, I have this yellow slip here I have been after for two years; now I have something to work on.

Q. You mean the one that you got from Mr. Agnew?

A. Yes; that is the starting.

Q. But you haven't any account of your own?

A. I will work it out from here.

Q. You will work it out from the one you got?

A. That's right.

Q. I understand you have no record yourself of the money Mr. Agnew gave you that passed through your hands to the bank?

A. Yes, I have a record.

Q. Will you produce it, please?

A. I haven't got it here; but I will get it from Mr. Isaacs.

Q. You remember the Powrie deal?

A. Yes.

Q. You were trying to buy property from Mr. Powrie in Curry County?

A. That's right.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. Do you remember this check of May 22, 1946—\$25,000? A. Yes.

Q. Check to Sam J. Wilson from Agnew, endorsed by Wilson. Did you ever get the Powrie timber? A. No, I did not.

Q. Ever return that money to Mr. Agnew?

A. I did not.

Q. Still have that money?

A. I still have it.

Q. What did you do with this \$25,000?

A. I tried to buy the Powrie tract of timber and somebody else beat me to it. [60]

Q. After you lost that deal, what did you do with the \$25,000? A. I have got it.

Q. You never accounted to Mr. Agnew for that \$25,000?

A. I think I accounted to him. He told everything as the result of my not being able to make the Powrie deal and I told him the freeze was still on.

Q. What do you mean by freeze?

A. In other words—everything would indicate I was out of the picture.

Q. You were out of the picture and you hung onto the money you had?

A. No, that was the reason I hung onto the money. I asked him for a statement many, many times, and when it came to the final point of where he froze everything and we ceased to have any busi-

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

ness dealings, I simply held the \$25,000 and wrote him to that effect. Wired him to that effect; this is the first I have heard of it.

Q. First you have heard of what?

A. The \$25,000.

Q. Now you received a draft from Mr. Agnew dated July 16, '45, for \$26,000? A. Correct.

Q. I am showing you that draft. That draft was for the acquisition of timber lands in Trinity County? A. Yes.

Mr. Maloy: Tax lands. Was it tax lands?

Q. (By Mr. Quinn): No. I am going to ask you—you attempted to get hold of, over there, 13 claims? A. Correct.

Q. 13 claims at \$2,000 a claim—\$26,000?

A. That's right. [61]

Q. That deal never went through?

A. That's right. I will go on with it and tell you what happened to that money.

Q. This \$26,000 you got from Mr. Agnew for these 13 claims?

A. That's right. I told him I would try to get them; I told him that's what they wanted. He sent \$26,000. I worked on it two or three months; I didn't get the claims; part of the money used to pay county tax liens over in Trinity County; the balance was used for other purposes I could account for.

Q. What other purposes?

A. \$14,000 advanced on the hotel.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. Did you advance that? Did he get you to advance that? A. Oh, yes.

Q. Did you ask him to do that—to permit you to buy into the hotel? A. Why certainly.

Q. He was to have an interest in the hotel?

A. That's right.

Q. You have sold the hotel?

A. That's right, but I haven't paid him off.

Q. You haven't paid him off?

A. Oh, yes, I have.

Q. You put \$14,000? A. Or thereabouts.

Q. Out of this check. You received other checks about that time from him?

A. Well, I don't know what they were; maybe I can tell you.

Q. Did you receive a check for \$17,000?

A. No.

Q. Never received a check——

A. Never received a check for \$17,000 at any time. [62]

Q. By the way, when was the hotel deal?

A. In August.

Mr. Maloy: What year?

A. 1946.

Q. (By Mr. Quinn): Here's a draft for \$20,000, August 8, 1945.

A. I know nothing about a check of that kind; where is my signature on there; if I drew it, it might have my signature——

Q. Sam J. Wilson——

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. I don't care who he charged it to. I didn't draw it. All the drafts I drew I signed. There's no \$20,000.

Q. It is your testimony you never got that \$20,000 represented by that?

A. I never got that. When is it—1945?

Q. Yes. A. No.

Q. You never got that \$20,000 and it was never placed to your credit here? A. Never was.

Q. In any bank?

A. No. Is that October 8, 1945?

Q. October 8, 1945, yes. A. No.

Q. You deny ever having received that?

A. I deny ever having received it. Unless he sent it down and I deposited it in the bank. I am getting a record today of what I deposited in the bank to the credit of the Klamath Cedar Company. I just took it in and deposited it; I had no connection with it.

Q. Where would you deposit it?

A. Here in the Bank of America here in town in the account of the Klamath Cedar Company.

Q. Under Klamath Cedar?

A. If that was the case; I don't know; but I didn't get it. [63]

Q. Anyway you never got the \$20,000?

A. I never got the \$20,000.

Q. Did you get any part of it? A. No.

Q. What other moneys did you get from Mr. Agnew that you put into the hotel?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. That's all.

Q. Did you get a check for \$17,000?

A. I didn't get any check for \$17,000, or any part of it.

Q. How much did it cost you to buy into that Lauff Hotel?

A. Cost me about fifty some odd thousand.

Q. Mr. Agnew put up \$43,000?

A. He put up \$29,000.

Q. He put up \$29,000?

A. And a fraction; I forget; that's all the money he put in the hotel.

Q. When you sold the hotel he was to get half?

A. I made a deal with him on the hotel months before the sale.

Q. That deal was when you sold it you were to divide it up? A. No.

Q. You were to get fifty-fifty on it?

A. I gave him a note for that; he didn't want any part of the hotel; didn't want anybody to know he was interested.

Q. You gave him a note?

A. That's right.

Q. How much?

A. \$29,700 and some odd dollars.

Q. In other words, according to you, he was to have no interest in the hotel?

A. He didn't want any interest in the hotel. [64]

Q. You gave him your note for \$29,000 to cover the amount of money he advanced you?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. He didn't want in the hotel.

Q. When did you make out that note?

A. Oh, along in February.

Q. February of '46? A. Yes.

Q. That you gave him that note—where did you make up the note? A. I made it up here.

Q. Did you make it yourself?

A. No; I don't know; I know I didn't because I can't type.

Q. Now, there's an Evans deal; you made out in Curry County a deed to Evans as Trustee?

A. Yes.

Q. How did you sign that deed to the Evans Products Company?

A. Because at the time it was part of the transaction on the county land and, as I recall, it had not been deeded to Mr. Agnew at that time; it was still in my name.

Q. How is that?

A. It had not been deeded to Mr. Agnew at that time; still in my name.

Q. Holding it in trust for Mr. Agnew?

A. No; yes, I was holding it in trust for Mr. Agnew.

Q. This timberland that you deeded to the Evans Product Co.?

A. I didn't deed any timberland; just deeded the cedar rights.

Q. Whatever it was you didn't deed any land to them; just cedar rights?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Yes; the Evans Products Company deeded to Mr. Agnew in return. [65]

Q. You got a deed from Margaret Ward Riddell dated—doesn't seem to show the date—I think in '45, recorded in volume 32, page 479——

A. From whom?

Q. Margaret Ward Riddell to Sam J. Wilson, an undivided 10/25 interest——

A. That was just about 2 months ago I got that deed.

Q. You got that deed about two months ago?

A. That's right.

Q. Does that property still stand in your name?

A. Yes, sir; always belonged to me.

Q. Did you pay for it yourself?

A. I sure did.

Q. You didn't use any of Mr. Agnew's money?

A. I did not.

Q. How much did you pay?

A. A thousand and some odd dollars. You mean to her? I paid her three thousand.

Q. As I understand that was your own money?

A. Well, I hope so. I just bought it about 2 or 3 months ago.

Q. The deed I am referring to here, Mr. Wilson—well, we have not the date of the deed here, but we have the volume——

A. I filed it with the recorder about 2 or 3 months ago.

Q. When did you transact the deal?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. About 2 or 3 months ago and recorded it, the day after I got it.

Q. Where did you get the deed from?

A. Mrs. Riddell.

Q. Directly from her?

A. Directly from her.

Q. Was it in escrow?

A. Yes, in the bank down here. [66]

Q. You don't remember the date of the deed?

A. No, but I can get the record very easy.

Q. Where is Mr. Runnell? You got a deed from him?

A. He has been dead a long time ago. I bought that through Brown and Brown.

Q. Did you have any contact with Muriel W. Reynolds, a widow? A. No.

Q. Did Brown and Brown get a commission on that? A. I imagine they did.

Q. Did you pay the commission? A. No.

Q. How was that commission paid, do you know?

A. Well, I paid—I forget what it was; whatever it was they got 5 per cent.

Q. Now, Mr. Wilson, you received a check in your name for the sum of five hundred and ten—

A. From whom?

Q. I am not asking you anything; I am calling this to your attention—you received in checks made payable to you and are cashed and are here in evidence:

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

1	.....	\$ 510.00
1	.....	5,000.00
1	.....	801.00
1	.....	568.96
1	.....	5,000.00
1	.....	5,641.00
1	.....	15,000.00
1	.....	2,500.00
1	.....	1,500.00
1	.....	3,500.00
1	.....	10,000.00
1	.....	5,000.00
1	.....	25,000.00
1	.....	1,760.00
1	.....	300.00
1	.....	264.00

Total\$89,544.96

What did you do with that money?

A. You say that many checks?

Q. Yes.

A. That all went to timberland and taxes.

Q. Will you tell me what you did with it?

A. I said it went for timberland and taxes.

Q. You specify.

A. How can I specify? Do you think I am a mindreader?

Q. Well, you are handling somebody else's money?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Mr. Maloy: That is objected to as incompetent, irrelevant and immaterial and not within the issues and I instruct the witness not to answer.

Mr. Quinn: All right; the record is in.

Q. Will you state, and give us now, and tell us now, what you did with \$89,544.96 that you received in checks from Mr. Agnew?

A. I bought timberland and paid taxes.

Q. That is not the answer.

Mr. Maloy: That is sufficient answer. I object to the witness giving any other or further answer and instruct the witness not to answer any further.

Mr. Quinn: Will you tell us which timberland and how much you paid for each piece?

Mr. Maloy: Same objection. It has been gone over piece by piece; repetitious, incompetent, irrelevant and immaterial, and not within the issues and I instruct the witness not to answer. [68]

Mr. Quinn: There are two additional items we have not been able so far to produce the checks—one for \$10,000 and one for \$17,000——

A. I didn't receive any \$17,000 and the \$10,000 I can't say—no \$17,000 check was ever given to me or credited to me.

Q. If you got the \$17,000 check what did you do with it? A. I didn't get the \$17,000.

Q. Never got it?

A. No. The \$10,000 check, the same thing. I did get some \$10,000 checks; I don't know which you refer to. There was never a \$17,000 check.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. What did you do with the \$10,000?

A. If I got it I will be able to account for it.

Q. Can you tell us now what you did with that?

A. I don't know; a lot of stuff over a period of years.

Mr. Maloy: I object to that; don't answer any further.

Mr. Quinn: Now, you received the following drafts:

1\$ 8,549.14

1 11,500.00

A. That draft was returned——

Q. Just a minute—I am not through with my question.

Mr. Maloy: You don't need to answer this; I am going to object.

Mr. Quinn: One for \$7,001.60——

Mr. Maloy: Don't answer until I instruct you.

Mr. Quinn: \$7,500; \$26,000; \$20,000; \$10,000; \$96,340; \$5,000; \$15,800. Total, \$207,690.74.

Q. Now, Mr. Wilson, what did you do with that money? A. How could I say what I did.

Q. What is that?

A. I can't tell you. [69]

Q. You can tell what you did?

A. I bought timber and paid taxes with it.

Mr. Maloy: That's sufficient answer.

Q. (By Mr. Quinn): Will you tell me what timber—and what taxes you paid?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Well——

Mr. Maloy: Objected to as incompetent, irrelevant and immaterial; all gone over; repetition; immaterial and I instruct the witness not to answer the question.

Q. (By Mr. Quinn): Did you use any of that money for any other purposes than to purchase timber? A. To pay taxes.

Q. To pay taxes; any other purpose——

A. Well, there might be some of that money was used, was deposited to the Klamath Cedar; I will check my account on that; he mailed me checks and I deposited them to Klamath Cedar.

Q. You deposited them to Klamath Cedar?

A. That's right.

Q. Outside of what you might have deposited to Klamath Cedar?

A. Oh, I paid other bills for him.

Q. What bills? A. I rented a millpond.

Q. How much was that?

A. I think one check for Klamath Cedar paid me for the amount of money I paid for the millpond—I have forgotten; five or six hundred. I bought some lots pertaining to the mill down there.

Q. You bought some lots pertaining to which mill? A. Klamath cedar mill; odd lots. [70]

Q. What was this money given to you for by Mr. Agnew? A. For the purchase of timber.

Q. Purchase of timber?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. Besides I done many other little things for him, too, you know.

Q. Out of this money then, I understand you to say you have not paid any of it out for anything but timber, or you might have reimbursed the Klamath Cedar Company—

A. There was other taxes; taxes on the mill.

Q. What taxes did you pay?

A. I have to get that record together.

Q. You haven't got that?

A. I will have it.

Q. Have you anything else you paid any of it on?

A. Might find something in the records.

Q. Did you use any for cruising?

A. Some of it.

Q. How much?

A. Oh, altogether maybe a couple or three thousand.

Q. What other thing did you use it for?

A. I handled all of Mr. Agnew's business down here; there might be a lot of things.

Q. You mean by that you handled it in reference to the mill?

A. I handled it in reference to everything excepting the operation of the mill.

Q. You handled all his business excepting the operation of the mill. What do you mean, here?

A. Here and in Oregon.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. That only had reference to the purchase of timber?

A. Well, there were mills involved, too, you know. [71]

Q. Mr. Agnew only operated one mill and that was the one down near Klamath?

A. He bought one up at Port Orford and that gave us an awful headache you know.

Q. He never acquired that?

A. I put up a lot of money on it; insurance and other things.

Q. Now, you were served with a subpoena duces tecum and in that it was provided you bring here an itemized statement of the moneys—what you did with this money.

A. I am sorry, Mr. Quinn, I have not been able to do it; but I will have to eventually do it.

Q. Are you claiming anything in this action on account of expenses and maintaining your office?

A. No.

Q. Or for secretarial help? A. No.

Q. Or telephone? A. No.

Q. Are you claiming anything for traveling expense?

A. No. Never sent in expense account or anything. In fact I never worked for Mr. Agnew on a salary.

Q. As far as cruising was concerned you only paid out about two or three thousand dollars?

A. Thereabouts.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. Did you cause any of the lands to be surveyed? A. Yes, I had some of them surveyed.

Q. Did you present Mr. Agnew a bill for that?

A. No. Only where it involved something like this Kane deal where we had a contract with Mr. Kane for a certain amount of timber.

Q. Have you got a contract? Did you have a contract with [72] Mr. Kane?

A. Mr. Agnew had a contract with him.

Q. Do you mean by that the Andrews-Kane deal?

A. No, it was on the mill he was going to build up here north of town. We agreed to furnish him the timber for, I think, 3.25 a thousand.

Q. Was there money paid out on that?

A. Yes, quite a little money paid out on that.

Q. Was the money you received from Mr. Agnew paid out on that?

A. No, I never sent him a bill for it.

Q. You never sent him a bill? A. No.

Q. How much was due on that—do you claim due? A. Well, odd amount—

Q. Would you give us—

A. Some idea? Maybe \$1,500.

Q. That's on account of contract for the furnishing of logs for a mill to be erected, is that it?

A. That's right.

Q. With Mr. Kane? A. Yes.

Q. Did you ever put in a charge for getting together these various contracts? A. Well, no.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. You never made any charge; you haven't got any record or statement of how much that cost to get hold of a certain tract of timber?

A. That was our deal.

Q. That was your deal—what do you mean?

A. That was the deal; I was to get a cut on the property.

Q. That was the deal where you got a cut on the property. Have you got a statement of the amount of taxes that you paid on these various pieces? [73]

A. I gave you a rough idea yesterday but I haven't had a chance to go through it.

Q. Have you a statement regarding it?

A. No, not a full statement.

Q. Now, you don't know how much you paid out on taxes? A. No, but the county does.

Q. You never kept a record?

A. I kept a record, but I want to check with the county to know whether he paid it or I paid it. The whole contention here is I asked for a statement to know what he paid and what I paid.

Q. How long have you known that this deposition and hearing was to be held yesterday?

A. Oh, I have known it for quite some time.

Q. Quite a long time. This was served on you way back in May?

A. Well, Mr. Quinn, I think I have furnished as much as Mr. Agnew furnished. There are a lot of checks there. The \$17,000 and the \$10,000 I never got, and a few other things.

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

Q. That's all right.

A. He didn't come in with a complete list by any manner of means, did he?

Mr. Quinn: Let me ask you: Of these amounts—checks were drawn, one for \$4,496.36——

Mr. Maloy: Going over the same thing again?

Mr. Quinn: No. [74]

The Witness: Have you a check for that much money there?

Mr. Quinn: I think so, Mr. Wilson; it is not directly to you.

Mr. Maloy: Unless it is shown that Mr. Wilson had something to do with these checks you need not ask him about them.

Mr. Quinn: Here is the check I was referring to. (Check handed to Mr. Maloy.)

Mr. Maloy: Of course you can ask him about it; I don't see how he can tell you anything; I can't.

Mr. Quinn: Check dated September 28, '43, drawn on Centralia Branch National Bank of Commerce for \$4,476.36.

The Witness: Where did I get this?

Mr. Quinn: I am showing you that check.

A. I don't remember anything about it. No endorsement on it—where does it concern me?

Q. Here's one to Harold A. Miller, January 2, 1945—— A. That's right.

Q. \$20,000? A. Yes.

Q. You know about that? A. Yes.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. How is it you didn't complete the deal with Kay—these 13 claims in Trinity County?

A. The reason I didn't complete it was because somebody else paid more money.

Q. Now, you got some of that Clutter property in your own name?

A. I put it in my own name.

Q. You still have it?

A. I still have it; I am not in the habit of buying timber for somebody without a good title. [75]

Q. Was that bought for Mr. Agnew?

A. I talked to Mr. Agnew about it; I could never get the title; I haven't got it worked out yet. I wrote Mr. Agnew and told him the title was not good and I would take it myself.

Q. Take it yourself?

A. Yes; we discussed it; I wrote about it two or three times.

Q. That was part of the same land as the Brukman and Russ? A. Yes.

Q. Was this an undivided interest in that or was the Clutter deal separate property?

A. Clutter was separate property; no, Clutter was all one and the same thing; Clutter, trustee. The title company would not recognize it.

Q. These are different tracts?

A. No, all one tract.

Q. Then you got an undivided interest in it—or a whole interest in a certain part?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. I got interests as I bought them from time to time.

Q. How much did you pay Clutter for it?

A. For the right Clutter had I paid him around \$2,000.

Q. How did you pay him?

A. Well, I had a draft, I think.

Q. Did you deal with Mr. Clutter directly?

A. No; I dealt with his attorney.

Q. Who is his attorney?

A. Oh, I forget the name. Way back in Kansas. Mr. Maloy: Wichita, Kansas.

The Witness: I worked on it three years and have not got it all [76] together yet; so I am not in the habit of turning over bad titles to anybody.

Mr. Quinn: I understood you to say that was your timber and you are not turning it over.

A. It certainly is my timber; I paid for it.

Q. Yes. Did you use any of the money Mr. Agnew had given you? A. I did not.

Q. To pay for it—how did you pay for it?

A. I paid for it with draft.

Q. Where is the draft—could you produce it, please? What bank did you draw that draft on?

Mr. Maloy: We can show the receipt for it; have it somewhere.

A. I have forgotten; it would show there if they find it.

Mr. Quinn: How much did you sell the Lauff Hotel for?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Oh, I have forgotten; \$150,000 or \$160,000.

Q. How much? A. \$150,000.00.

Q. When was it you resold that?

A. August, 1946.

Q. Did you get the money for it? A. Yes.

Mr. Maloy: You need not answer any more questions concerning the Lauff Hotel.

Mr. Quinn: Did you make any accounting to Mr. Agnew?

A. I had no reason to make any accounting to Mr. Agnew. Mr. Agnew doesn't appear in any way.

Mr. Maloy: You need not answer any further.

Mr. Quinn: Did you have anything to do with J. Tyson in that Clutter deal?

A. Never heard of him.

Q. How did you pay that—where did you [77] pay it? A. I paid it to that bank there.

Q. This bank here is the bank here; is the bank in Eureka? A. That's where I paid it.

Q. Bank of America? A. Yes.

Q. How did you pay it?

A. I can't tell you offhand; it is paid, isn't it?

Q. Did you pay by cashier's check?

A. I don't recall.

Q. Did you ever pay any of these deals by cashier's check? A. Some of them.

Q. Does that refresh your memory there—it says on the bottom of it——

A. That's what I paid it with—cashier's check.

Mr. Quinn: This is a receipt, Eureka Branch

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

124. Bank of America, Eureka, acknowledged 8-25-45 and dated received 8-25-45, dated 8-21-45, Sam J. Wilson, Eureka, California. Letter on file. Amount \$1997.80. Down at the bottom it says Cashier's check payable to Charles Clutter.

Q. Was there any other business dealings on that? A. That's all.

Q. Is this the same deal that Reid got \$2000 on?

A. No, Reid had nothing to do with that.

Q. What did you do with this \$26,000, dated July 16, 1945? This shows Sam J. Wilson, Eureka Branch, Bank of America, Eureka, California, \$26,000. Sam J. Wilson. Did you deposit that in your account or what did you do with the actual money?

Mr. Maloy: Object to that as repetition; all gone over 2 or 3 [78] times You need not answer the question.

Mr. Quinn: Here's another one. November 15, '45—at sight—Sam J. Wilson—\$10,000.

Mr. Maloy: Objected to. You need not answer the question. Mr. Wilson; it has all been gone over time and again.

Mr. Quinn: You got that \$10,000?

Mr. Maloy: That is objected to; don't answer the question. Repetition; gone over 2 or 3 times.

Mr. Quinn: Then you refuse to tell us whether or not—

Mr. Maloy: I refuse to let the witness answer,

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

put it that way. May I see that last item you were discussing—\$10,000?

Mr. Quinn: Look at the check.

Mr. Maloy: I withdraw the objection; that has not been before us.

The Witness: This is for taxes.

Mr. Quinn: You received that draft?

A. That's right.

Q. What did you do with the money?

A. I don't know offhand.

Q. Did you deposit it in the bank to your credit?

A. I presume I did.

Q. You don't know which account?

A. I only have one.

Q. Yesterday you said you had three.

A. Well, I said I done business in 3 different banks. Over a period of five years.

Q. Which bank do you do all your business with so far as business with Mr. Agnew was concerned?

A. Part of the time here and part of the time in Eureka; part [79] of the time in Gold Beach.

Q. You deposited these checks in different banks?

A. Well, I can tell where I deposited them; now that you give me this lead I will have to try to finish the job; I will be able to account for it.

Q. You will do so?

A. I will have Mr. Isaacs finish the job.

Mr. Quinn: Here's a check dated March 29, 1946, \$5000, endorsed by you.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. We took that up yesterday; I don't know.

Q. What did you do with that?

A. I probably deposited it in the bank.

Q. What timber did you buy with the money you got from this check?

A. I don't recall; might be a balance due; might have been.

Q. If you didn't apply it on timber, did you apply it on anything else?

A. I could have deposited it in the bank to the credit of the Klamath Cedar Company.

Q. Here's one dated April 20, 1945—\$10,000—endorsed by you.

Mr. Maloy: Don't answer that last question. It has been gone over. How much is that?

Q. \$10,000—what did you do with that money you received from that check?

A. I couldn't tell you offhand. I am trying to figure. I see it is deposited in the Seattle Branch of the National Bank [80] of Commerce; I don't remember doing any business up there.

Q. This check was drawn on the Centralia National Bank of Washington. \$10,000. You don't know what you did with the money you got for this check?

A. Not right offhand.

Q. Here's one dated March 8, '44, for \$5000, endorsed by you. What did you do with that money?

A. I will have to go to the bank and go through the whole record.

Q. Where did you deposit the check?

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

A. Probably deposited it here. I don't see any bank on the back of it.

Q. Do you know what account you deposited it in—which one of your accounts?

A. I couldn't tell you.

Q. Here's a check—6-28-45, \$15,000, signed by Agnew, endorsed by you—did you receive such a check? Did you cash it? A. I sure did.

Q. Where did you deposit the money?

A. I think that went to—that \$15,000 went to the Kepner Tract.

Q. Did you write a check out? You think the \$15,000 went to the Kepner tract; did you write a check out yourself? A. I believe I used this.

Q. There is no other signature on it but your own?

A. I think the bank—Eureka Branch—— [81]

Q. Here's a check dated April 10, 1945, \$2,500 signed by J. J. Fox. What did you do with that money?

A. I think I bought some timber with that.

Q. What timber?

A. Fox bought it and gave me the \$2,500 check.

Q. Did you deposit that in your bank account?

A. I don't know that I did.

Q. Where did you deposit it?

A. Something came up pertaining to Klamath Cedar. I never got any money for Klamath Cedar unless given to me with instructions—I don't recall that now.

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

Q. Here's a check dated March 3, 1945, \$1,500.

A. Well, that was used for timber.

Q. Did you deposit that in your account?

A. I might have bought a draft for it.

Q. What timber did you apply it on?

A. You know I bought a lot of timber.

Q. Yes, you handled a lot of money, too. You haven't any check that you checked out against that to pay for that timber?

A. I will get that for you.

Q. Here's a check of March 3, 1945, for \$3,500 endorsed by you.

A. I don't understand these checks; look kind of funny to me. They are all up in Seattle; I never cashed any checks in Seattle.

Q. What did you do with this \$3,500? [82]

A. I can't tell you right off hand.

Q. You don't know on what deal you applied it?

A. I think that check was for timber I sold to Mr. Agnew. 480 acres I sold him up on Lobster——

Q. 480 acres you sold him?

A. I think that's the check; I am not sure.

Q. Where did that timber come from?

A. I owned it.

Q. When did you acquire it?

A. I bought it before I knew Mr. Agnew.

Q. Is that your signature on there?

A. Yes. I am not sure about that; but I think that's it.

Q. Here is one dated November 10, 1945, for

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

\$5,641. A. Well, that's taxes.

Q. Did you get that check?

A. I got that check to pay the taxes.

Q. Did you endorse it? How did you pay the taxes? A. I paid taxes with this check.

Q. In which county?

A. Curry County; there it is right down on the bottom. In fact I know I did.

Q. No other signature on this check beside your own.

A. All right; I paid taxes with it in Curry County.

Q. How did you pay the taxes?

A. I will get you a receipt.

Q. I want no receipt. How did you pay it—by your own check—cashier's check?

A. I don't remember.

Q. Here's one dated March 8, 1944, \$568.96.

A. Well, I think that's for some lots I bought down in [83] connection with the Klamath Mill.

Q. That's for lots? A. Yes.

Q. Did you pay for the lots?

A. I paid for the lots; that was the check he gave me.

Q. Did you pay by your own check?

A. I paid by my own check or with money, I don't know which.

Q. Whose initials are those on the back of that? That is the one that has no endorsement on it; are those your initials?

Defendant's Exhibit N—(Continued)
(Deposition of Samuel J. Wilson.)

A. I don't know how the check would be cashed without my endorsement on it in the first place; so I haven't any idea. I know I bought some lots there at that time. I wouldn't say the bank would take the check without endorsement.

Q. Who did you buy these lots from?

A. I have forgotten; several people down in Arcata.

Q. Here's another check for \$801, February 11, '44.

A. That was used to pay for some timber in Curry County.

Q. That is your signature? A. Yes.

Q. Who were you buying that timber from?

A. From the county; have you got those county deeds? You will find all that stuff in there. These checks you refer to.

Q. Only this check?

A. I have some more of the same kind.

Q. You didn't turn this check over, did you, to the tax collector or the Curry County officer up there?

A. Why, here it is; pay to the order of any bank Curry County, Oregon; could have been.

Q. That is the stamp you are reading. [84]

A. All right; well, that is where it was used and what it was used for.

Mr. Quinn: Mr. Wilson, since we adjourned last night and reconvened this morning—have you

Defendant's Exhibit N—(Continued)

(Deposition of Samuel J. Wilson.)

brought in any of those records I asked you for yesterday—ledgers, or——

A. Only one I could pick up down there; the draft I showed you there.

Q. You have not brought in any of your book accounts? Bank statements or bank books?

Mr. Maloy: He said he didn't have any. It is all repetition; you went over it yesterday; he told you what he had.

Mr. Quinn: You have a bank book in which all these accounts——

A. I have none with me.

Q. You have statements from the bank?

Mr. Maloy: He need not answer these questions. I would object to them if brought in any way; under the subpoena you have it was too general. I would not let him bring them in any way.

Mr. Quinn: That is all.

.....,
SAM J. WILSON. [85]

State of California,
County of Del Norte—ss.

I, George T. Berry, Jr., Justice of the Peace in and for the County of Del Norte, State of California, hereby certify as follows, to wit: That Samuel J. Wilson, the defendant and cross-plaintiff in the above-entitled action, produced as an adverse wit-

Defendant's Exhibit N—(Continued)

ness by plaintiff and cross-defendant under Section 2055 of the Code of Civil Procedure, appeared before me on the 23rd day of July, 1948, at two o'clock p.m., at the courtroom in the courthouse in the City of Crescent City, County of Del Norte, State of California; that before the taking of said deposition said witness was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, in the testimony he was about to give in said action; that said witness was thereupon examined by counsel for plaintiff and cross-defendant on oral interrogatories, and that said witness made answers thereto under oath as hereinbefore contained; that all of said questions and all of said answers thereto were by Margaret Duffy, a competent shorthand reporter, duly sworn therein, taken down in shorthand and later transcribed into typewriting, as hereinabove contained, all of which was done under my direction and supervision; that said deposition was carefully read by the witness and corrected by him in any particular he desired and then subscribed by said witness in my presence.

And I further certify that I am not nor is said shorthand reporter a party to, or interested in the above-entitled action.

And I further certify that I have written my initials near each and every correction made by said witness.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at the City of Crescent

Defendant's Exhibit N—(Continued)

City, County of Del Norte, State of California, this
..... day of, 1948.

.....,
Justice of the Peace in and for the County of Del
Norte, State of California.

Received in evidence October 25, 1955.

DEFENDANT'S EXHIBIT P-1

Sam J. Wilson
Box 847
Redwood City, Calif.

Jan. 22, 1944.

S. A. Agnew,
Centralia, Wash.

Dear Mr. Agnew:

I am enclosing copy of a letter from Newhouse in reference to Sec. 20, TS37, SR14. I guess Mr. Dimmick must have found a little cedar as well as fir. I don't know what your attitude is in this matter but from what I know the surveys are not too accurate, and this might be a cheap way of locating the corner. Write me at Gold Beach if you want the survey made and I will arrange with Newhouse.

I am also enclosing copy of letter from A. E. Bradford, Marshfield, Oregon, re the Black River Falls tract. I don't think there is any rush about this, and from what you said, on the phone, maybe,

you don't want it. However, from the tone of the letter, I think you can get it at your own price.

Yourse truly,

/s/ SAM J. WILSON.

(Enc.)

DEFENDANT'S EXHIBIT P-2

Kidwell & Darrah
Attorneys-at-Law
206 Beacon Building
Wichita, Kansas

February 3, 1944.

Mr. Sam J. Wilson,
Redwood City, California,
Box 847.

Dear Sir:

Re: Oregon timber land.

In reply to your letter of January 28th, Mr. Clutter will not accept your offer of \$2,000.00. He asks that I inform you that he will not consider any offer of less than \$4,000.00 for the deeds and assignments as set forth in my letter of January 24th.

Very truly yours,

DALE KIDWELL,

/s/ DALE KIDWELL,

Of Kidwell & Darrah.

DK/J

P.S. A typographical error appeared in my letter of January 24th in which I listed the "Franklin" heirs. This should have read "Brinkman" heirs. The same correction should be made in your letter of January 28th.

D. K.

DEFENDANT'S EXHIBIT P-3

S. A. Agnew Lumber Company
Centralia, Washington

February 11, 1944.

Mr. Sam J. Wilson,
Box 847,
Redwod City, Calif.

Dear Mr. Wilson:

We have decided to cruise the Halaway tract at the head of Coos River, and as soon as you feel better, wish you would proceed to Coquille and arrange accommodations for McCutcheon and Sherwood. Also see if you can rent a truck for transportation to and from the job.

What has Bankus decided to do, he has had plenty of time to make up his mind, and unless your proposition is accepted right away, withdraw the offer. As you know Manning is not enthusiastic about the purchase of this timber.

I will forward all the documents, maps, etc., on the Coos River tract to the Coquille Hotel, Coquille.

Would suggest that you have Newhouse make the survey in Hunters Creek as per your letter of the 4th.

With best wishes,

Yours very truly,

S. A. AGNEW LUMBER CO.,

By S. A. AGNEW.

SAA

LM

DEFENDANT'S EXHIBIT P-4

Sam J. Wilson

Box 847

Redwood City, Calif.

Feb. 15, 1944.

Mr. Elmer Bankus,
Brookings, Oregon.

Dear Elmer:

Enclosed you will find copy of a letter from the Big Boss which is self explanatory.

Now, Elmer, if we are going to do any business, let me know right away in care of the Coquille Hotel, Coquille, and I will meet you in Gold Beach and close the deal.

With kind personal regards, I am,

Yours truly,

/s/ SAM J. WILSON.

DEFENDANT'S EXHIBIT P-5

Sam J. Wilson
Box 847
Redwood City, Calif.

July 30, 1944.

S. A. Agnew,
Centralia, Wash.

Dear Mr. Agnew:

I am just in receipt of a bill from the Curry County Abstract Company together with a title policy on the Reid tract which you will find enclosed. This bill, of course, includes everything for the past year and for this reason I think it is reasonable and wish you would mail check to cover.

I also received the title policy on the Lobster Creek tract I sold you together with his bill for which I mailed him a check today. This policy you will also find enclosed.

I have written Bedingfield regarding his bill for services and made mention of his charge of \$100 for his trip to Gold Beach to file foreclosure proceedings, and suggested that in the final settlement on the mortgage foreclosure this be taken into consideration, therefore, I think it okey to mail him his check.

I received a copy of Buffington's letter to Mr. Bedingfield in which Buffington stated that I made him a proposition, which is not true, I just listened

to his story and told him I would take the matter up with you, and if you were interested, which I didn't think you would be, I would contact him. So the proposition set forth in his letter was really his own proposition, and, of course, should be taken with a grain of salt. I have written Bedingfield to that effect.

I also received a bill from Keith Leslie, certified public accountant, for services in securing data on the indebtedness of the Port Orford mill company, and some time spent on the Bankus timber deal trying to arrive at a sale price on the Brookings timber. I think the bill is enough but should be paid. I wish you would also make a check to cover.

With kind personal regards, I am,

Yours truly,

/s/ SAM J. WILSON.

DEFENDANT'S EXHIBIT P-6

Sam J. Wilson

Box 847

Redwood City, Calif.

July 30, 1944.

Mr. S. A. Agnew,
Centralia, Washington.

Dear Mr. Agnew:

I was unable to locate Brown regarding the car loadings but will see him on my return. Tell Jack

I couldn't locate the kind of loading tongs he wanted so he better bring some down.

One of the heirs of the Frick Estate is bucking on signing the deed so will take care of that tomorrow.

Am going to have my glasses changed and will get out of here Wednesday.

I am wondering if you still want the log pond? I suppose Joe will have the answer when I get there; if so will see Mrs. Moore at Crescent City.

I wired Kay to get busy on the Freeman timber. It looks as though Buffington is about ready to throw in the sponge from the tone of Bedingfield's letter, so this will release the mill machinery at Port Orford.

I will go on up to Marshfield on this trip and find out what is going on, and then get busy on some timber near the mill. I will also feel Pucket out on that Section. I don't think of anything else right now. Will contact you later.

With kind personal regards, I am,

Yours truly,

/s/ SAM J. WILSON.

DEFENDANT'S EXHIBIT P-7

[Letterhead]

Wilson Timber Company
Eureka, California

October 24, 1944.

Mr. S. A. Agnew,
Agnew Lumber Co.,
Centralia, Wash.

Dear Mr. Agnew:

I called Mr. Groom of the California Barrel. He informed me that they will gravel the road into Pucket's property weather permitting. This of course, is uncertain. Pucket was in yesterday and is anxious to make a deal and believe the price can be lowered considerably.

If you really want the property, I am enclosing a copy of letter from Miller under date of October 19, I am also enclosing a copy of wire received this a.m. I called him this afternoon and he seemed very disturbed about the tax situation. You will notice after reading the letter and wire, that he is somewhat changeable.

He did say on the phone however, that he might consider selling at one dollar and a half per M, on both fir and redwood in Section Twenty, guaranteed cruise. I understand although it has not been confirmed that the redwood mill has changed hands. This being the case, possibly you could sell the redwood to them.

After it is all said and done. It might be necessary to log the Reynolds tract and sell part of the logs to the mill at Smith River. However, if you think the Miller timber on Section Twenty is worth a dollar and a half per M. I believe I could go up there and make a deal with him. In case you want it, wire me and I'll make the trip.

While I didn't mention anything over the phone regarding the Jones Creek deal. He did intimate that he would take twenty thousand dollars and you assume the taxes.

In his letter to me you will note in the enclosed copy he is asking for a price on your holdings. Therefore it might be possible that a trade could be made for Section Twenty and other fir they own in that vicinity. This is just a thought, but at any rate so far as Jones Creek is concerned, I would suggest that we just let him sit and he might thaw out.

The timber referred to in my wire is really good and can be bought for around a dollar per M. Considering the location, I consider it an exceptional buy. If you could make a deal on Hunters Creek and get your money out of the mortgage. I think it would be a wise move and if you could see the timber I am positive you would agree with me.

I talked to Bedingfield on the phone this afternoon and he said the sheriff is preparing to take over Friday or Saturday. With the understanding

he would advertise for bids upon instructions. Let me know your wishes in these matters.

With kind personal regards,

Your truly,

/s/ SAM J. WILSON.

SW/mb

DEFENDANT'S EXHIBIT P-8

[Letterhead]

Wilson Timber Company
Eureka, California

November 3, 1944.

Mr. S. A. Agnew,
c/o Agnew Lumber Co.,
Centralia, Washington.

Dear Mr. Agnew:

All deeds are now recorded with the exception of the first transaction made with Putter. The deed, however, was made to Erwin T. Quinn and I am not at all too well satisfied with the delay.

Of course, you remember Putter insisted that Mr. Miller have a certain right of way, I have agreed to this. But under certain conditions first, that Miller not be allowed to use any roads that you may build, without paying for the privilege and second that

he pay for any timber he may destroy in the process of building his own roads.

Miller is one of those sharp practice right of way specialists and of course, would like very much for you to build the road so he can take his timber out.

This I wouldn't agree to. So maybe he will be glad to sell.

Putter and Quinn have agreed to submit a separate right of way contract to Miller. Along the lines I suggested and I am to have a copy in a day or two, which I will mail to you.

With kind personal regards I am,

Yours truly,

/s/ SAM J. WILSON.

SW/mb

P.S. I am just in receipt of the rough draft of the contract from Quinn, which you will find enclosed. With your approval I will go ahead and close the deal. However, think it might have a good effect if you have a few suggestions to make.

DEFENDANT'S EXHIBIT P-9

[Letterhead]

Wilson Timber Company
Eureka, California

November 7, 1944.

Mr. S. A. Agnew,
c/o Agnew Lumber Co.,
Centralia, Washington.

Dear Mr. Agnew:

I am just in receipt of a letter from Mr. Ed Fletcher, who represents the following companies—The Ward Redwood Co.; The Blue Creek Redwood Co.; The Marguerette Ward Co.; also The National Bank of Bay City, Michigan. With a complete cruise on the holdings as above set forth. Which I am mailing you under separate cover.

I mailed you cruise on The National Bank of Bay City, Michigan, holdings last week and you already have a statement on the Requa Timber Company I gave you some time ago. There is also enclosed a map under separate cover, covering the cruise on the Requa timber holdings by 40S.

Mr. Fletcher, I understand also represents the Sage Land and Improvement Co., whom I understand owns approximately 1,750,000 feet of timber which is shown on the map I am enclosing in this letter.

I am writing for a complete cruise on the Sage holdings. Mr. Fletcher has particularly requested

that this map be returned. I also received a copy of a letter addressed to Jack.

You will note on the map that a good portion of the Sage holdings are pretty well out of the Redwood belt. And I am informed that they have considerable fir. At any rate, as soon as I receive the cruise, I will mail you a copy.

With kind personal regards I am,

Yours truly,

/s/ SAM J. WILSON.

SW/mb

DEFENDANT'S EXHIBIT P-10

(Copy)

Wilson Timber Company
Eureka, Calif.

January 4, 1945.

S. A. Agnew,
Agnew Lumber Company,
Centralia, Wash.

Dear Mr. Agnew:

I finally got the Mill deal all straightened out and will record the deeds today. Mr. Quinn is preparing a statement and same will be enclosed in this letter.

I referred to the Leonard Track last night in our phone conversation. This Track adjoins the Haight 160 and Kay says it should be acquired for right away purposes.

I will stop at Crescent City enroute to Fort Orford and will take the matter up with Helen Leonard, the owner. In the meantime, will hold up the recording of the Vancycle Deed, the John Paul Deed, the Haight Deed, and the Miller Deed, as I believe it will be easier to acquire this property before these deeds are recorded.

I am sending you under separate cover a map covering your holdings in the Jones Creek area, consisting of approximately 6,900 acres.

Will be in Port Orford tonight and will advise you regarding the situation there within a day or two.

With kind personal regards, I am

Yours truly,

SAM J. WILSON.

SJW/ej

DEFENDANT'S EXHIBIT P-11

[Letterhead]

Wilson Timber Company
Eureka, California

Jan. 4th, 1945.

S. A. Agnew,
Agnew Lumber Company,
Centralia, Wash.

Dear Mr. Agnew:

I finally got the Mill Deal all straightened out and will record the deeds today. Mr. Quinn is pre-

paring a statement and same will be enclosed in this letter.

I referred to the Leanard Track last night in our phone conversation. This Track adjoins the Haight 160 and Kay says it should be acquired for right away purposes.

I will stop at Crescent City enroute to Port Orford and will take the matter up with Helen Lenard, the Owner. In the mean time, will hold up the recording of the Vancycle Deed, the John Paul Deed, the Haight Deed, and the Miller Deed, as I believe it will be easier to acquire this property before these deeds are recorded.

I am sending you under separate cover a map covering your holdings in the Jones Creek area, consisting of approximately 6,900 acres.

Will be in Port Orford tonight and will advise you regarding the situation there within a day or two.

With kind personal regards, I am

Yours truly,

SAM J. WILSON,

By /s/ SAM J. WILSON.

SJW/ej

DEFENDANT'S EXHIBIT P-12

Western Union

[Telegram]

1945 Jan. 16 AM 8 19

PRQ2 DL PD—Eureka, Calif., Jan. 15 425P

S. A. Agnew.

Clutter Accepted Offer for Sander's Creek Timber. Arrow Mill Intimate They Will Pay \$30.00 for Cedar in Pond at Crescent City. Leaving for San Francisco Tomorrow to See Stapleton. Believe Deal Can Be Worked Out. Will Call You Tonight Regarding Arrow Mill's Proposition.

SAM J. WILSON.

\$30.00.

DEFENDANT'S EXHIBIT P-13

[Letterhead]

Wilson Timber Company
Eureka, California

March 6, 1945.

S. A. Agnew,
Centralia, Washington.

Dear Mr. Agnew:

You mentioned to me that you were looking at a power plant at Prescott which you were interested in. I believe that if you decided to put this plant

in, you could sell juice to the Klamath Power Company. Their gross runs about 1500 a month. Of course they would take the power right from the plant and therefore you would not be under any additional expense. When I go through there tomorrow will talk with Foster and if it sounds interesting will let you know and maybe something might be worked out, if you are forced to put in your own power.

My thought is, if you had fuel capacity sufficient to run the present power plant nights, with the watchman acting as engineer, it might pay out.

With kind personal regards, I am

Yours truly,

SAM J. WILSON,

/s/ SAM J. WILSON.

SJW/ej

DEFENDANT'S EXHIBIT P-14

Western Union

[Telegram]

PRQ6 NL PD—Eureka Calif Mar 13

1945 MAR 14 AM 8 28

S A Agnew—

Agnew Lumber Co

Have Learned One Small Policy Expires on the 19th. Have Instructed the Nasburg Insurance

Agency to Renew Same Unless They Receive Notice to the Contrary. In Other Words Unless the Mortgage Is Paid Off Before the 19th I Will Leave on the 15th and Will Remain in San Francisco Until the Hearing.

SAM J. WILSON.

19th 19th 15th.

DEFENDANT'S EXHIBIT P-15

Western Union
[Telegram]

1945 Mar 28 AM 8 11

PRQ17 NL PD—Eureka Calif Mar 27

S A Agnew

Agnew Lumber Co. CX

Am Working on Puckett Deal and Copy of Contract Will Be Forwarded to You Tomorrow. Just Received Letter From Bedingfield and He Suggests That You Should Not Take Less Than the Full Amount in Cash From Buffington and McDuffee. The Only Reason They Are Making the Offer Is to Protect the Boat Claim. From What I Can Gather the Government Loan Has Not as Yet Been Consummated. Mailing Draft and Contract From Standard Battery and Separator Co. Today.

SAM J. WILSON.

DEFENDANT'S EXHIBIT P-16

[Letterhead]

Wilson Timber Company
Eureka, California

March 27, 1945.

S. A. Agnew,
Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

Enclosed you will find contract signed by Standard Battery & Separator Company, also draft for \$6,259.00, which is less \$2.00 for collection charges.

The Correl Creek deal will include 14 claims at this time with a balance of 13 to be negotiated for. J. S. Moore wants \$2,000.00 per claim. I consider this the best buy I've been able to make. Red Spearing, as I told you, went out to look at the timber and is now endeavoring to horn in, but he's too late. The Moore Claims control the situation.

Puckett is a pretty hard man to do business with. He don't want to get an assignment from the Ward Estate. Says that Mr. Ward would not be in favor of transferring the property. However he is willing to make an assignment, and you probably will have no difficulty in getting the proper assignments from the Wards, because what they're looking for is their money. Mr. Mitchell is drawing the contract which

we have been thrashing over and same will be mailed to you tomorrow.

Regarding the Buffington and McDuffee deal, I think the only thing to do is to hang tough, as they will have to protect their Boat if the government loan doesn't go through. And I certainly wouldn't reduce the amount one cent.

I am enclosing a copy of a letter just received from Beddingfield, also a copy of a letter from Mr. Collier H. Buffington to Mr. Bedingfield. I think the proper thing to do is to turn the deal over to Bedingfield for collection.

While I have not been able to find out anything regarding the government loan, it's my opinion that they are experiencing some difficulty.

Enclosed you will also find copy of a letter received from Mr. Nasburg with \$8,500.00 policy covering three Willamette Utility Carriers of the Port Orford Lumber Company on which you held a mortgage. You will note by the letter from the Nasburg Insurance Agency, that the balance of \$57,000.00 on the Mill Property will expire on April 15th.

Yours very truly,

SAM J. WILSON,

/s/ SAM J. WILSON.

SJW/ej

DEFENDANT'S EXHIBIT P-18

McCutchen, Thomas, Matthew, Griffiths & Greene
Counselors at Law

July 5, 1945.

Mr. Sam Wilson,
c/o Wilson Timber Company,
218 First National Bank Bldg.,
Eureka, California.
Port Orford Lumber Company.

Dear Mr. Wilson:

Enclosed are Assignment of Mortgage, Assignment of Chattel Mortgage, and Assignment of Second Preferred Mortgage of Enrolled Vessel with the additions requested by Mr. Cooley.

Very truly yours,

/s/ CHARLES L. FINNEY.

Enclosures

DEFENDANT'S EXHIBIT P-19

[Letterhead]

Wilson Timber Company
Eureka, California

July 26th, 1945.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

There are some matters to be cleared up on the timber deal, and will go to Barberville tomorrow. Will call you from there.

In the meantime, I am working out a deal with Barnum on 6 Sugar Pine claims adjoining Moore's holdings on South Fork Mt. He says they are very good claims. Moore has them under option until the first of the month, and I think it will take a few days to clean the other matter up, at least until after the first, you know what I mean.

Now regarding the Requa Timber, you will receive a letter from Mr. Barnum. It seems that he has connections with somebody that thinks he knows something about it.

I called Mr. Zorick this morning, the President of the Company, and he informed me that if the offer they now have was not accepted, he would notify me, and would be glad to talk over the Fir situation. And if the offer was accepted, he thought

the new owners would be glad to sell the Fir, as they are only interested in the Redwood. Barnum understands the situation, but the party is asking him to write you direct. I do know this, that any deal made, will have to be made direct with Mr. Zorick.

You will recall, we discussed the balance due on the timber in Curry County. I am writing for a statement to August 10th, and will mail same to you as soon as received.

With kind personal regards, I am

Yours truly,

SAM J. WILSON,

/s/ SAM J. WILSON.

SJW/ej

DEFENDANT'S EXHIBIT P-20

[Letterhead]

Wilson Timber Company
Eureka, California

Aug. 7th, 1945.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

Mr. Springer of the Mohawk Lumber Company of Eugene, Oregon, spent the day with me looking

DEFENDANT'S EXHIBIT P-21

[Letterhead]

Wilson Timber Company
Eureka, California

Aug. 11th, 1945.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

I am just informed that the sale to be held on the 27th in Trinity County will be offered in individual partials. And then they anticipate asking for a bid for the entire tract. And from what I gather, will sell same whichever way brings the most money. Of course you know there is a lot of goat land, therefore, I think it should be gone over very carefully. I understand Long Bell Lumber Company has a man looking over the timber now, and Goggins, the fellow that bought all the cheap timber, is also looking it over.

I am meeting Mr. Peters' cruiser in Crescent City Sunday. He wants to look over the Siskiyou Forks and Jones Creek setup. I haven't tried to work on him on the mill, but believe there is a possibility that he might be interested. But this must be handled with silk gloves. You understand, I am not committing myself one way or another, just trying to work up a deal.

With kind personal regards, I am

Yours truly,

SAM J. WILSON,

/s/ SAM J. WILSON.

SJW/ej

DEFENDANT'S EXHIBIT P-22

[Letterhead]

Wilson Timber Company
Eureka, California

Aug. 24th, 1945.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

Here is one I want you to read very carefully: I have investigated the Government flat bottom barges, equipped with loading cranes, which will be sold in the comparatively near future at a fraction their cost. 25% down and balance over a period of time. As I understand it, for the transportation of lumber, you can get a priority rating. This will also apply to tugs and landing barges.

I am now endeavoring to get all the facts and figures: Talked to a very competent barge man here

in Eureka who is also interested. I discussed the Crescent City and Brookings set-up with him, which he is very familiar with, and he suggested a three barge set-up. Says the large type barge which is 187 feet long with a 45 foot beam will carry from eight hundred thousand to a million feet of lumber. His idea on the three barges would be, one loading, one unloading, and one in transit. This would keep a sea-going tug in continuous operation which would enable you to make a round trip to Los Angeles every ten days, and to San Francisco every five days. Of course this arrangement would be all right, if you had sufficient tonnage. But so far as Brookings and Crescent City are concerned, think one tug and a barge would do the work. The tug and barge crew would number seven men against thirty-two on a lumber schooner. From what I have learned from Anderson and Middleton of Aberdeen, Washington, and the local situation here, believe this is a very practical and cheap transportation.

Now, here is another way of working: Buy a small barge that will carry about 350 to 400 thousand feet of lumber, figuring loading and unloading time, would require about a week for a round trip. Hire a sea-going tug to bring the empty back and the load down. And as I understand, will cost about \$15.00 per hour. In this way, you would only pay for the tug two days a week, as they would make the round trip from Eureka in about 10 to 15 hours, depending on the wind. Of course, I'm not a tug man, but from what information I have gathered, believe I

would be safe in stating that the cost of transporting the lumber to Eureka would not exceed \$2.00 per thousand. And in this, you could allow for a considerable investment in the barge.

The rail loading facilities are such that you could load from the barge onto the car. I believe, Mr. Agnew, if we could acquire the Bankus holdings with what you already have, on this kind of a set-up you could buy the lumber at the mills less the trucking charges and commission, and sell in San Francisco and Los Angeles at the Portland rate, besides getting a good price for your stumpage [2 words illegible] beat running a sawmill all to hell. This is just another one of my ideas, but it is worth considering.

With kind personal regards, I am

Yours very truly,

SAM J. WILSON,

/s/ SAM J. WILSON.

P.S. Just received deeds and assignments on the Clutter timber in Sanders Creek, which have been in the making several months.

SJW/ej

DEFENDANT'S EXHIBIT P-23

[Letterhead]

Wilson Timber Company
Eureka, California

Aug. 24th, 1945.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

In reference to my talks with Bankus, I find there is going to be considerable building in the valley and in and around Brookings as the result of the lily-bulb business. The class of people that are coming in, are not just dreamers, but a pretty substantial lot with money. And it is my firm belief there will be several hundred good homes built between Crescent City and Brookings as soon as the material is available. You know this whole thing up there is really a Bankus dream. I told him I thought one of his best moves would be to get a sawmill, and if the right kind of terms were made on his timber, I might be able to induce someone to come in. To this he seemed to be quite agreeable. This is where we left off. I was to see him the end of this week, but as there are so many other matters, I will put it off until later.

Now my proposition would be: If a plant were built reasonably soon in Brookings, I could make a very satisfactory deal on the timber, also get the use of the mill pond and sufficient ground to build

the plant on, with all the dock facilities. I believe, Mr. Agnew, I could get a mill to come in there on a stumpage basis, on approximately the same basis that Peters is considering in Crescent City.

I have written you in a previous letter regarding the possibilities of getting a barge. However, with the local demand there will be for lumber, and the present rate for trucking to Arcata, I think it is a damn good plan to build a mill. Of course with water transportation it would be a honey.

With kind personal regards, I am

Yours very truly,

SAM J. WILSON,

/s/ SAM J. WILSON.

SJW/ej

DEFENDANT'S EXHIBIT P-24

Western Union

[Telegram]

Centralia, Wash.

December 22, 1945.

Sam J. Wilson,
Lauff Hotel,
Crescent City, California.

Left Unexpectedly. Will Return Thursday. Stop.
Investigated Farm Pond. Think Impractical and
Would Not Want at Any Price.

S. A. AGNEW.

DEFENDANT'S EXHIBIT P-25

[Letterhead]

Wilson Timber Company
Crescent City, California

February 11, 1946.

S. A. Agnew,
Care Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

I just received word that the accountant will be here Wednesday or Thursday, and will send you a complete statement on the timber purchases for last year, which you will receive not later than the 20th.

Yours truly,

/s/ SAM J. WILSON.

SJW/M

P.S. Enclosed are copies of Weekly Trinity Journal, and the Humbolt Times, covering timber lands for sale.

Encl—2

DEFENDANT'S EXHIBIT P-26

[Letterhead]

Wilson Timber Company
Crescent City, California

June 19, 1946.

Mr. S. A. Agnew,
Centralia, Washington.

Dear Mr. Agnew:

Mr. A. K. Wilson communicated with me yesterday, pertaining to the proposition I made you by letter. This deal can still be made.

So far I have been unable to get a definite price on the 160 in Klamath controlled by the Quinn family, but will do so in a day or so. I do know if you get it you won't be able to mill over one-half the timber with your present set-up. I think you should look at the timber in section 8 before you definitely turn it down. I don't see how you can turn this deal down and still consider you are using good business judgment—but it's your mill. I feel I was responsible, Sam, for your buying this mill, and now that you have an opportunity for God's sake get rid of it before you lose your tail.

I am also in receipt of a letter from the Benson Lumber Company in San Diego, stating that they will increase their contract to thirty-five million, with two years to deliver. These are two damn good deals, and if we are going to do anything let's get busy.

Defendant's Exhibit P-26—(Continued)

I have stuck along with you for three years and done a damn good job, if I do say so myself—bought your timber for nothing and you could sell out today for a couple of million profit. Now Sam, if you are going to give me a chance to work out our original deal, I am willing to go along, otherwise I'm not much of a hand to stick along on a losing proposition that should be making money.

You have operated the mill down here for two years with an original investment of seventy-five thousand dollars—and today am satisfied you have two hundred thousand invested. There is not a mill in California that isn't making money and has not been for the past two years, with most of them operating on a shoe string. Now, who is to blame? Not you. But Sam, you certainly pick some Lulus to run your business and you are sooner or later going to find out it requires brains and not so much brawn to run a business. You know the old saying "When in Rome do as the Romans do" and you should know that by now, and if you don't you're going to find out, when you are in California you do as the Californians do if you want to make a success. I'm going to be frank and honest with you, as long as you continue to run your business from Centralia with the aid of glorified hook tenders, sawyers and edgemen as your executives, you never will make a success of it.

My cards as you know have always been on the table and these weird happenings down here you

Defendant's Exhibit P-26—(Continued)

have mentioned on various occasions;—for instance the hiring of fifteen men while I was intoxicated, reports emanating from the hotel, the big tract of timber I wasn't smart enough to buy up the Winchuck which does not exist, the telephone call regarding the Moore ranch and so on; are mere propaganda and Sam, petty jealousy has been the ruination of many a good organization. Some of your so called confidence talk too much and remember that those gypo loggers down here can teach some of the loggers from Centralia how to get cheap logs. That operation in the Siskiyou is superficial evidence of that. I have watched this performance for two years and have thought that sooner or later you might get your belly full, but have given up hope until you get it into your head that all the capable loggers and mill men do not all come from Centralia. However, I believe you have an exceptionally good man now operating your mill if he is left alone. Anyway Sam you are a damn good fellow, in fact a swell guy—but as I now understand you have appointed Mr. Sherwood your general superintendent and I am not working with a glorified hook-tender, his pants are too big for him and the quicker you put him back in kilts the better off you will be. Nobody knows anything about logging but himself, and everybody is a crook in his opinion.

Now that you know that I am a promoter and considered a damn good one, why not get together and make some money. You know money isn't new

Defendant's Exhibit P-26—(Continued)

to me, but I don't like to be under suspicion as I feel the case is at the present time. You just figure it this way. You trusted me and I trusted you and I am still to be trusted. I made some very good buys in timber that you never would have known about and now that the job is pretty well along it seems that the propaganda concerning my private life is getting too much for you. When I went into this deal with you I didn't know that I was dealing with anyone else but you. In fact I didn't hear anything to the contrary until about a month ago when you mentioned it at Klamath. Now that all the work has been accomplished, the timber purchased at a low figure, the boys are all getting real smart. However it was your and my good judgment that made them smart. Under these conditions, I think it's time we get together and discuss our affairs, as I am not all pleased with the present set up. You are a fine fellow but evidently susceptible to unwarranted propaganda and I don't know why you should be. Your interests have certainly been taken care of to the best of my ability, and I don't think there is any room for criticism.

In final conclusion, I feel I have done a damn good job and it is now time I began to look out for my own interests. The timber was bought right and now is the time to sell. I have no hesitancy in predicting that within the next two to three years you can buy it back for one-half of what you can sell it for today.

Defendant's Exhibit P-26—(Continued)

I want you to give this a little thought. There is no hard feelings. I just feel the whole thing is too much of a one-man show. I feel I warrant your trust and with my ability and experience, I am going to be of value to somebody.

Hoping to see you soon.

With kind personal regards, I remain,

Yours truly,

/s/ SAM J. WILSON.

DEFENDANT'S EXHIBIT P-27

[Letterhead]

Wilson Timber Company
Crescent City, California

May 31, 1946.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

I tried to reach you last night by phone. Had a long session with A. K. Wilson yesterday and I finally sold him on the following if he stays put, and I consider it an exceptionally good deal for you in as much as your timber is divorced from the mill.

1. He agrees to buy the mill for \$250,000.00.
2. He pays you thirteen thousand (\$13,000.00) dollars per month with no interest until paid for. At which time he takes possession.
3. He agrees to sell you 21 million feet of timber in Section 8, both redwood and fir, at \$5.00 per M with the understanding that you let a contract for the logging and he to take all redwood logs over 50 inches at the contract price, or, will trade you a like footage from his operation of redwood logs under 50 inches. Under this agreement you could saw both redwood and fir, and, the small redwood logs will float, and of course you understand the market is \$7.00 more for the lumber.
4. He's to lease the mill to you for \$1.00 per thousand. This would leave a balance of \$12.00 that you would receive, net, over and above OPA prices.
5. The deal is based on a minimum cut of one million feet per month for which you receive \$12,000.00 over and above OPA prices. Five thousand would be represented in timber and seven thousand in money. When he has paid the full amount of \$250,000.00 represented by timber and money your lease at \$1.00 per M is automatically cancelled, and he's the sole owner of the mill.
6. Wilson is to pay for half the road into the timber which is to be a contract job. This is entirely separate and is to be paid for in cash.

Here's the proposition, Mr. Agnew. It resolves itself into this. In less than two years time you will

receive \$250,000.00 for the plant if his payments are made promptly at the end of each thirty days. Payment is represented by \$5.00 per M in timber and \$7.00 per M in cash. If the payments are not made every thirty days, the contract is cancelled. Over and above the sale of the mill, you should have not more than \$19.00 logs at the mill for which A. K. Wilson will agree to pay you the ceiling price for the lumber, f.o.b. cars or at destination, at the Portland rate, 2% cash discount, no commission.

As I see it, on \$19.00 logs which includes the stumpage charge, you should make a profit at OPA prices of at least \$10.00 per M. Based on a cut of approximately 21 million feet, you should come out on the deal at the end of two years with at least \$450,000.00 for your plant; cutting his timber.

Sam, I consider this a dam good deal and if I were you I wouldn't lose any time negotiating while he's in the notion. Don't let the OPA bother you as this kind of a set up will stand up for the reason that you have a mill so situated that it's not profitable to haul logs fifty miles. Wilson owns the timber adjacent to the mill and can use the mill to cut the timber. Therefore, it would be very easy for you to show that it was only good business to sell your mill under these terms and conditions with good intent.

Wilson suggests that you and I meet with him in his office in Portland on Tuesday, June 4th, and, until you are able to get into the timber on section

8 and provide sufficient logs to operate, he will pay \$13.00 cash per M per month on the purchase price of the mill so long as you are milling your timber.

With kind personal regards, I am

Yours truly,

/s/ SAM J. WILSON.

SJW :leb

DEFENDANT'S EXHIBIT P-28

[Letterhead]

Wilson Timber Company
Eureka, California

July 3, 1946.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

I am just in receipt of your letter and note that you will freeze and close the book on everything north of the Klamath-Smith River divide except where Wells is logging if we do not get the Powrie timber. I wired you covering the situation this morning before receiving your letter, so unless we can deal with Kelly on a satisfactory basis on the property adjoining the Reynolds' tract, I guess the freeze is on.

I have been trying for months to discourage you with that Klamath operation, but it seems that you can't be discouraged. So, Sam, I guess you will just keep on bucking the tiger. You have had everything happen to you down there except a fire, so unless you are fortunate enough to have one before next spring, the high water will probably finish the job.

A. K. Wilson is still willing to deal for the Klamath mill, and you can take that money and build a mill here in Crescent City adjacent to your timber and make more profit out of it accidentally than you can with the Klamath operation on purpose.

Well, Sam, you're the boss; it's your mill and it's your money, and I wish you a lot of good luck.

With kind personal regards, I am

Very truly yours,

/s/ SAM J. WILSON.

SJW:an

DEFENDANT'S EXHIBIT P-29

[Letterhead]

Wilson Timber Company
Eureka, California

July 12, 1946.

Mr. S. A. Agnew,
c/o Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

I am now in the process of closing a deal with A. K. Wilson for the Andreatta tract located on Terwall Creek two miles from Klamath, approximately 86,000,000 feet. This is the reason for not writing sooner.

My deal calls for \$4.00 on a stumpage basis over a period of three years. If A. K. Wilson gets the lumber, the stumpage price will be \$2.00, OPA prices if revived or top market prices, all things being equal.

You and I have done business together for quite some time, and I think it's a good idea that we get together and discuss our affairs. There's no use, Sam, in being too stubborn about things. I will be very glad to work with you on any kind of a reasonable basis.

Hoping to see you soon, I am

Very truly yours,

/s/ SAM J. WILSON.

SJW :an

DEFENDANT'S EXHIBIT P-30

Crescent City, California

July 28, 1946.

Mr. S. A. Agnew,
Agnew Lumber Company,
Centralia, Washington.

Dear Sam:

I was informed today you would be in Klamath tomorrow and I think it is now high time we got together. My cards are always on the table and it seems as though some one has been pushing yours around. All my business Sam was done with you direct, I don't recognize anybody else. I am building a dam three miles north of Crescent City on the Brookings highway that will hold eight million feet of logs. It might be well for you to drive by and I don't think it will cost any more than that mis-fit that your Jack is building in Klamath.

I hope, Sam, that you start to do a little thinking before it is too late. Come down sometime the day after Jack arrives and see how drunk he can get, don't be foolish all your life.

As I have written you before, you have too much brawn and not enough brains in your organization—too many yes, yes men, and for Christ's sake why don't you get smart.

Yours truly,

SAM J. WILSON.

DEFENDANT'S EXHIBIT P-31

(Copy of original letter.)

Hotel Lauff
Crescent City, California

November 30, 1946.

Mr. Samuel A. Agnew,
Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

It would be much easier to work up statements if I have the records pertaining to each individual purchase that you have in your office. Therefore, when you come down this next time, I wish you would bring them with you, and I can check up the matter of taxes.

I wish you would arrange to spend a few hours with me, and get the whole matter straightened out.

I am enclosing tax statement which should be paid before December 5th, at which time they will become delinquent. These should be paid at once.

You have a map pertaining to the Jones Creek holdings in Del Norte County, and think it would be advisable to check the tax statement against it.

If you are going to abandon the Westbrook tract, I would be glad to notify the Assessor, Frank Burtchell.

Now, in reference to the Humboldt holdings, I think there must be something wrong regarding the Humboldt holdings which I recently purchased where the taxes have raised about 400%. I am holding these out until I hear from the Assessor. I think it would be well to let these go delinquent. It doesn't seem possible that they can raise these taxes from \$8.00 a quarter to approximately \$45.00 without some explanation. However, the taxes on the Kepner tract should be paid.

Hoping to see you soon, I am

Your very truly,

/s/ SAM J. WILSON.

SJW:l

DEFENDANT'S EXHIBIT P-32

California Veneer Company
Klamath, Del Norte County
California

December 11, 1946.

Mr. Sam Wilson,
Patrick's Creek Tavern,
Crescent City, California.

Dear Sam:

We are enclosing herewith tax bill covering the piece of timber we sold Agnew and we would like to have you take care of this matter. We would

probably be liable for one month of the total tax bill but it is so small that we presume it would be best for you to pay the whole thing.

If you are in need of more cores contact us and we will take care of you.

We left your silver to be redone but when I left Los Angeles it was not ready.

Very truly yours,

CALIFORNIA VENEER
COMPANY,

By /s/ [Indistinguishable].

EWB:dn

Enclosure

DEFENDANT'S EXHIBIT P-33

Wilson Timber Company
Crescent City, California

March 6, 1947.

S. A. Agnew,
c/o Agnew Timber Company,
Centralia, Washington.

Dear Mr. Agnew:

Sorry I didn't see you when you were down last as I would like to straighten out our accounts.

There is a timber deal down in Eureka that you might be interested in. As you know I have always given you first call on any timber deals that come to my attention. I will give it to you in brief.

There is 150 million feet in the Willow Creek District owned by a Mr. Parker and Gleason and they need \$80,000 for which they will give a mortgage for \$120,000. Better yet, they will put the deed in escrow for a period of six months with the understanding that they will pay \$120,000. If not paid promptly you would be the owner of the timber.

They have a contract which I read with the plywood company in Eureka which is about ready to start operations at \$4.00 per M. I went through the plant, maybe you have to, and it is a very modern, efficient plant and cost over a million dollars, but it is purely a promotion and I doubt that the present management will be successful in its operation, and in my opinion there is a good chance that you would own the timber referred to at \$80,000.

The timber is located adjoining the Hoopa reservation 35 miles from Eureka, and is a very good stand. It is adjacent to the 160 that I mentioned to you when I last saw you that I was offered \$2.00 per M. At present day prices I consider the stand worth at least \$300,000 to \$350,000. They could sell it around that figure, but they are inclined to believe they will make more money by selling it on a stumpage basis. This is the reason they are willing to pay the premium for the money.

I am mailing you under separate cover some letters that I received from the tax collector of Humboldt County that are no doubt receipts for taxes. Also a letter from E. O. Wright which was opened by mistake.

Very truly yours,

/s/ SAM J. WILSON,

Patrick's Creek Tavern,
Crescent City, California.

P.S.: If you are interested, wire me as there are several others nibbling.

DEFENDANT'S EXHIBIT P-34

Wilson Timber Company
Crescent City, California

April 5, 1947.

S. A. Agnew,
Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

We are unable to arrive at any accurate figure on anything until we have a statement of the amount of money involved.

Your statement to me the other day as to the amount does not in any way compare with mine.

Mr. Isaacs would like to have the exact amount of timberlands acquired through me and the price, exclusive of the Klamath mill.

My dealings were all with you and therefore the settlement should be made with you and when we have a statement on timberlands purchased, price, etc. I am sure we can come to some understanding as to final settlement.

Very truly yours,

/s/ SAM J. WILSON,

Patrick's Creek Tavern,
Crescent City, California.

SJW/h

DEFENDANT'S EXHIBIT P-35

(Copy)

April 10, 1947.

Mr. Sam J. Wilson,
Patrick's Creek Tavern,
Crescent City, California.

Dear Mr. Wilson:

Not long ago our office received information that you had paid the taxes on the Klamath Mill property. I did not think much about it but last Friday while at the office in Klamath, Evelyn said that she had been paying the taxes on the mill property but when she went to pay them for 1946, they told her that they had been paid and, of course, she wanted

the receipts and as I knew nothing further about it, of course, she wanted to know why.

There are several pieces of timber which you told me you had the deeds for and I wish you would forward them to this office or have them so I can get them the next time we meet. We are making a check of all properties and if you will do this it will be a great help and save a lot of trouble.

I called from Klamath last Friday but was unable to reach you.

Hoping to hear from you and see you soon.

Yours very truly,

DEFENDANT'S EXHIBIT P-36

(Copy)

Crescent City, California

April 16, 1947.

S. A. Agnew,
Agnew Lumber Company,
Centralia, Washington.

Dear Sam:

I am just in receipt of your letter under date of April 10th and note what you say about the taxes on the Klamath Mill plant for 1946. I no doubt paid these taxes at your request, as I did a good many

Defendant's Exhibit P-36—(Continued)

other, which from the tone of our conversation the last time I saw you, your office has no record of.

I wrote you on June 3rd and June 19th, 1946, covering the situation so far as you and I are concerned, and to date nothing had been done about it. I wrote you on April 5th that we were unable to arrive at anything until we have a statement on the amount of money involved according to your figures, and I am waiting for this statement.

You might as well understand, Sam, that I have been pushed around as long as I am going to be. We can settle peaceable or any way you want to have it, but it is going to be settled. It seems strange to me that on or about March 1, 1946, you made it known to me that you were handling other people's money, both estates and minors. Since that date you have maintained that you are only acting as agent for estates and minors. Now my dealings are with you, and all the properties purchased are in your name and so far as I know still are, and it is you I am looking to for a settlement.

The timber I purchased for approximately \$350,000 is now worth and can be sold for more than five times that amount which you should know, Sam, any court of equity will recognize if that is the way you want it, and it is time some kind of a settlement is arrived at.

I want to give you one example of your method of doing business. On March 1, 1946, you wrote me

Defendant's Exhibit P-36—(Continued)

condemning me in these words, "I can't imagine you, as good as you are, paying out real money for a proposition in California you never have seen," stating personally that you did not have much confidence in the ability of Mr. Kane of Ventura, California, whom you are now doing business with. And when I tried to make a deal with him you wired me as follows: "Deal has been close on the output of the Klamath Mill."

In other words, Sam, since March 1st you have been very evasive and not too much to my liking and since receiving your letter of July 2, 1946, stating that if you lose the Powrie Timber deal we will freeze and close the book on everything north of the Klamath, I have been waiting for you to make up your mind what you want to do. In the meantime, I have put on the same freeze.

Now, Sam, as I stated before my business dealings are with you and all the timber is in your name, unless it has been recently changed. This timber was purchased at an average price of about 32c per M. and can be sold on the present market at many times that price. So your "people," as you refer to them, must understand that the man who made it possible to purchase this timber at the ridiculously low price referred to, is going to be paid as per our agreement. In this I take no responsibility for the operation of the Klamath Mill. You and Jack Sherwood can have that.

Defendant's Exhibit P-36—(Continued)

I am perfectly willing to sit down across the table and make a fair and equitable settlement, and you keep the timber or I want a 12 months' option at the going market price, locations taken into consideration, and you well know I am capable of selling the timber. There is no use bickering around, we might just as well come to an understanding, peaceable or otherwise, and get it off our chests.

Now, in final conclusion, here are a few things to think about: You will no doubt recall the day of the county sale at Gold Beach, how Mr. Nettleton was eliminated, and you came down prepared to pay twice what the property was bought for. Maybe your people don't know about that. These are just little things that, as I might say, it takes brains to figure out.

Oh, yes, and don't forget the tax reduction on the property in Del Norte and more than that you know that if it had not been for the months of hard work put in Curry County we never would have gotten the tax lands for practically nothing.

Since my associations with you we have sold, to my knowledge, 40 acres of timber for \$6,000 in Pistol River and you got the money. This was sold out of a tract of 1,120 acres that we paid in all \$11,000 for. Don't forget that I took care of all overhead expenses, including office at Eureka, paid Bill Kay, office girl, rent, telephone, etc. Purchased Trinity County tax lands at \$4.00 per acre, now

Defendant's Exhibit P-36—(Continued)

can be sold for \$29.00 to \$40.00 per acre. Purchased Del Norte County and Humboldt County timber in California, and Curry County timber in Oregon. Helped you with the mill at Klamath that I was not interested in. Got you out of a mess at Port Orford. Took care of the taxes, No Charge.

Now, Sam, to show you that you are not right, you would not have come down and asked me to mail all the records to you on the supposition that your accountant, Mr. Stone, wanted to go over them with the understanding that you would return same when you did not intend to return them. You are not doing business with a damn fool, very trusting, but not simple. We went into this to make money buying and selling timber, but we don't seem to be selling any, through no fault of mine.

As I have explained to you in my previous letters, my private life is my own and it is so strange that you and your people didn't find out that my private life was not beyond reproach until after, through my efforts, you were in a position to cash in for 1½ to 2 million dollars, over your investment, which I was responsible for. I would say, Sam, you were damn lucky you met me for your own benefit as well as your peoples, estates, etc., because you well know that if it had not been for me you would not have the timber.

So you will understand, Sam, why I feel that 31½ years of my best effort is worth money. All you have to do is just look up my past earning power which you will find when I worked was well over

Defendant's Exhibit P-36—(Continued)

\$50,000 per annum and I surely worked for 3½ years on this deal.

Now all I want is a fair and equitable settlement and let's get down and figure it out. I have been fair with you right straight through and you know it, and I expect the same treatment in return. I will be very glad at any time to meet with you on any fair and equitable basis of settlement or my lawyer will be very glad to meet with your lawyer on the same basis.

Very truly yours,

.....,

SAM J. WILSON,

Patrick's Creek Tavern,

Crescent City, California.

SJW/h

DEFENDANT'S EXHIBIT P-37

(Important)

Crescent City, California

June 21, 1947.

Mr. S. A. Agnew,
Agnew Lumber Company,
Centralia, Washington.

Dear Mr. Agnew:

I received your letter stating that you would be down on Tuesday and return on Friday.

I called at the Mill on Thursday, and found that you had departed Thursday morning.

Now, Sam, I wrote you a letter under date of April 16th, addressing it your Centralia, Washington, office, and sent a copy of it to the Mill at Klamath. I noted that you state you have not received a letter from me since March. It seems mighty strange to me; one letter might have been lost, but surely both of them should not have been lost. However, in case they were, I am enclosing a copy of the letter in question.

There is no reason, Sam, why you and I should have any differences, and I think the best thing for us to do is to sit down and talk it over, and the sooner the better.

Your son informed me that you were contemplating rebuilding the Mill at Klamath. This I cannot understand, with the harbor improvement now under way in Crescent City. Morrison-Knudsen have purchased the Portland Tug and Barge, and will run regular barge service from Crescent City for California points and off-shore loading.

With your timber located where it is, it looks to me that you will add from \$6.00 to \$7.00 per M. to your cost in hauling the logs to Klamath and then bringing the lumber to Crescent City. However, that is entirely up to you, but I wanted to let you know there is really going to be a barge line out of Crescent City, and more than that, that I have a very

desirable mill site, as you know, ideally located for your timber.

With kindest personal regards, I remain,

Sincerely,

/s/ SAM J. WILSON.

SJW :l

(Copy)

DEFENDANT'S EXHIBIT P-38

July 9, 1947.

Mr. Sam J. Wilson,
Patrick's Creek Inn,
Crescent City, Calif.

Dear Mr. Wilson:

On my return I found your note with letter enclosed, dated April 16, and I cannot see the object of this letter, as you well know after hounding you for two years for a statement and continuous promises, the last being that you would definitely have your auditor come to Centralia or advise where we could meet, pursuant to furnishing a statement by you; and I cannot believe that you, in your right mind, wrote this letter dated April 16. Frankly, I think it was sponsored by some one who knows nothing about the case or was trying to give a false

impression to someone—I don't know to whom. And I must repeat again that our people are becoming more insistent that you furnish a statement as to the moneys which were given to you for a specific purpose, and certainly they are entitled to this.

Yours very truly,

.....

(Copy)

DEFENDANT'S EXHIBIT P-39

December 17, 1947.

Mr. Sam J. Wilson,
Crescent City, California.

Dear Sam:

I received your letter of December 3 but have been away, hence the delay.

It seems strange, Sam, that after trying to get a statement from you for over two years and the many promises that you have made to furnish same, stating that your auditor would have it ready at such and such a time and you would arrange to come to Centralia or meet me in Crescent City or get the statement in some manner many times, now you seem to have a new angle of right about face and ask when we are going to furnish you a statement. What we want, Sam, is a statement from you

showing just what you have done with all the money.

With best wishes and compliments of the season,
I remain,

Yours very truly,

.....

DEFENDANT'S EXHIBIT P-40

December 3, 1947.

Mr. S. A. Agnew,
c/o Agnew Lumber Co.,
Centralia, Washington.

Dear Sam:

Now that you have become a timber baron in this section, I was just wondering how you feel, but don't overlook the fact that you neglected to settle with the guy that made you the timber baron. I was really surprised that you had the nerve to sue me for you know there was no just cause. Now that you have demonstrated beyond any question of doubt that you have petty larceny in your soul, I feel it is time for me to take action, which I have done.

You know when I first met you we seemed to get along all right until the timber became valuable, which I told you it would, and now you refer to

your people. The only person that I have had any dealings with is yourself, and you know it. When you purchased the timber in Curry County, you paid 20 per cent down and the balance later. In other words, Sam, you couldn't have done this without me, but you neglected to settle with me.

I am perfectly willing to settle any differences we have on an equitable basis due to taxation. And I think the smart thing for you to do is to get over your stubborn ideas and come down to earth and settle this matter before it goes any further. I don't want to hurt you, but I am not going to be made a monkey of. I want a settlement, and I want it before the first of January. Otherwise, we are going to lock horns in the courts, and you know you are on the wrong side of the fence.

You know how well I bought this property and I can sell it to the same advantage. So far as the Benson Lumber Company is concerned I discovered them and can do a much better job with them than you. I am perfectly willing to sit down and discuss ways and means of resolving this situation with you personally. I am also willing to bury the hatchet and carry the entire matter to a successful conclusion along the original lines, which you know I am capable of doing.

I am sending a copy of this letter to **Klamath** as well as **Centralia**, so there will be no excuses, as in the past, for not receiving the same.

Yours truly,

/s/ SAM J. WILSON.

DEFENDANT'S EXHIBIT P-41

Wilson Timber Company
Manchel Building
Grants Pass, Oregon

February 16, 1950.

Mr. C. D. Cunningham,
Attorney at Law,
Centralia, Washington.

Dear Mr. Cunningham:

As per our conversation in Centralia, I am enclosing certified copies of deeds of record in Curry County with the exception of the Bankus tract, which I will forward to you tomorrow.

I have the deeds on all the California property prepared by Mr. Quinn.

Wish you would check against the complaint and see if same is covered in Curry County. I have prepared Quitclaim deeds from these certified copies enclosed. If same are satisfactory I can see no reason why we can't close the deal when the Bargain and Sales deed you mentioned is forwarded to Mr. Quinn.

As I mentioned to you, I am anxious to go South for a further rest, and will stop at Patrick's Creek Lodge for a few days. Therefore, wish you would drop me a line in care of Patrick's Creek Lodge,

Crescent City, California, if you are satisfied with the deeds as set forth.

Yours truly,

/s/ SAM J. WILSON.

SJW :j

5 Encl.

P.S.: In the Quitclaim deeds I have prepared I have omitted the timberland in Township 36 South, Range 14 West, W.M., which is to be deeded to me.

Received in evidence October 25, 1955.

DEFENDANT'S EXHIBIT Q

Contract to Purchase Tax Title Property

This Contract, made and entered into this 1st day of September, 1943, between Curry County, a municipal subdivision of the State of Oregon, hereinafter referred to as the Seller, and S. A. Agnew of Centralia, Washington, hereinafter referred to as the Purchaser,

Witnesseth:

The Seller hereby agrees to sell and the Purchaser hereby agrees to purchase from the Seller the following-described real property located in the County of Curry, State of Oregon, to wit:

Defendant's Exhibit Q—(Continued)

Lot 10, SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 1.

E $\frac{1}{2}$ of the SE $\frac{1}{4}$ and an undivided $\frac{1}{4}$ interest in the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 3.

NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 10.

NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 11.

N $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 13.

NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and N $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 14.

SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 27.

NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 34.

NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the S $\frac{1}{2}$ of Section 36, all in Township 36 South, Range 14 West.

Lots 1, 2, S $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 3.

SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 3.

SE $\frac{1}{4}$ of Section 7.

E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 9.

W $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ and the W $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 10.

SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 17.

SE $\frac{1}{4}$ of the NE $\frac{1}{4}$, Lots 2 and 3 of Section 13.

Lot 2, E $\frac{1}{2}$ of the NW $\frac{1}{4}$, except 1.28 Ac. Rd. in Section 19.

NW $\frac{1}{4}$ of Section 26.

W $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 29.

Lot 2, and the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 30.

Defendant's Exhibit Q—(Continued)

Lots 3 and 4, and the $E\frac{1}{2}$ of the $SW\frac{1}{4}$ and the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of Section 31.

$NW\frac{1}{4}$ of the $NE\frac{1}{4}$ and the $NE\frac{1}{4}$ of the $NW\frac{1}{4}$ of Section 32.

All in Section 36.

All in Township 38 South, Range 13 West, W.M.

Lots 1 and 2, $SE\frac{1}{4}$ of the $NE\frac{1}{4}$ and the $SW\frac{1}{4}$ of the $NW\frac{1}{4}$ and Lots 3 and 4 in Section 1.

Lot 1 and the $SE\frac{1}{4}$ of the $NE\frac{1}{4}$ and the $SE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 2.

Lots 1 and 2 and the $SE\frac{1}{4}$ of the $NE\frac{1}{4}$ and except Cedar Tbr. in Section 3.

Lots 3 and 4, $S\frac{1}{2}$ of the $NW\frac{1}{4}$ of Section 3. $W\frac{1}{2}$ of the $SW\frac{1}{4}$ and the $N\frac{1}{2}$ of the $SE\frac{1}{4}$ and the $SE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 3.

$E\frac{1}{2}$ of the $NE\frac{1}{4}$ of Section 8.

$S\frac{1}{2}$ of the $NE\frac{1}{4}$ and the $NW\frac{1}{4}$ and the $SW\frac{1}{4}$ and the $SE\frac{1}{4}$ of Section 9.

$SE\frac{1}{4}$ of Section 10.

$NE\frac{1}{4}$ of the $NE\frac{1}{4}$ and the $S\frac{1}{2}$ of the $NE\frac{1}{4}$ and the $NW\frac{1}{4}$ of the $SW\frac{1}{4}$ and the $NW\frac{1}{4}$ of the $SE\frac{1}{4}$ and the $E\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 11.

$NE\frac{1}{4}$ and the $SE\frac{1}{4}$ of the $NW\frac{1}{4}$ and the $NE\frac{1}{4}$ of the $SW\frac{1}{4}$ and the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 12.

$SE\frac{1}{4}$ of the $NE\frac{1}{4}$ and the $NW\frac{1}{4}$ and the $SE\frac{1}{4}$ of Section 13.

$NE\frac{1}{4}$ and the $E\frac{1}{2}$ of the $NW\frac{1}{4}$ of Section 14.

$NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of Section 15.

Defendant's Exhibit Q—(Continued)

NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the S $\frac{1}{2}$ of Section 16.

E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 17.

SE $\frac{1}{4}$ of Section 22.

S $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and Lot 7, and the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of Section 23.

NE $\frac{1}{4}$ of Section 24.

An undivided $\frac{3}{8}$ interest in N $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ in Section 25.

S $\frac{1}{2}$ of the NE $\frac{1}{4}$ except 3.14 acres des. Vol. 23, pages 444-457, Deeds, in Section 25.

N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ except 9.21 A., Vol 23, pages 444-457, Deeds, in Section 25.

SW $\frac{1}{4}$ except 104.53 Ac., Vol. 23, Pages 444-457, Deeds, in Section 25.

SE $\frac{1}{4}$ except 0.65 Ac., Vol. 23, pages 444 to 457, Deeds, in Section 25.

NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 26.

An undivided $\frac{1}{2}$ interest in W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 26.

SE $\frac{1}{4}$ except 19.0 Ac., Vol. 23, pages 444 to 457, Deeds, in Section 26.

NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 27.

Defendant's Exhibit Q—(Continued)

E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the W $\frac{1}{2}$ of the SW $\frac{1}{4}$
and the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 34.

NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 35.

NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SW $\frac{1}{4}$
and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 36, all
in Township 38 South, Range 14 West, W.M.,
Curry County, Oregon.

Lots 7, 8, 9, 10 and 11 in Section 1.

E $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$ and
the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 1.

Lots 9, 10, SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of Section 3.

SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the S $\frac{1}{2}$
of the SE $\frac{1}{4}$ of Section 5.

Lots 1, 8, 7, 10, 11, and the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$
of Section 6.

NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$
and the S $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the E $\frac{1}{2}$ of the
SE $\frac{1}{4}$ of Section 7.

NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SE $\frac{1}{4}$
of the NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$
and the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 8.

SE $\frac{1}{4}$ of Section 8.

NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the W $\frac{1}{2}$ of the NE $\frac{1}{4}$
and the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ and the NW $\frac{1}{4}$
of the SE $\frac{1}{4}$ of Section 9.

SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$
and the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of
Section 11.

W $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$
and the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the W $\frac{1}{2}$
of the SW $\frac{1}{4}$ of Section 12.

Defendant's Exhibit Q—(Continued)

NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 12.

An undivided $\frac{1}{2}$ interest in SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 12.

NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 13.

SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 14.

SW $\frac{1}{4}$ and Lots 6 and 7 and the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 16.

Lot 4, SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 17.

Lots 1 and 2 and the SE $\frac{1}{4}$ of Section 18.

W $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the E $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ and Lots 1, 3 and 4 of Section 19.

N $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 20.

W $\frac{1}{2}$ of the NE $\frac{1}{4}$ and Lot 2 and the W $\frac{1}{2}$ of the W $\frac{1}{2}$ and Lot 3 of Section 21.

SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 22.

E $\frac{1}{2}$ of the E $\frac{1}{2}$ and the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 23.

E $\frac{1}{2}$ of the E $\frac{1}{2}$ and the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ ex. 2.38 ac. rd.; SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ ex. 2.21 ac. road, in Section 24.

NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 26.

Defendant's Exhibit Q—(Continued)

W $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Section 27.

Lot 2 and the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 28.
NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$
and the S $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ and
SE $\frac{1}{4}$ of Section 29.

SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$
and the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the N $\frac{1}{2}$ of
the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and
Lot 1 of Section 30.

The SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the W $\frac{1}{2}$ of the
SE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec-
tion 32.

NW $\frac{1}{4}$ of Section 34.

W $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$
and the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ and the E $\frac{1}{2}$ of
the SE $\frac{1}{4}$ of Section 35, all in Township 39
South, Range 13 West, W.M., Curry County,
Oregon.

Lots 3 and 4 and the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ and
the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 1.

Lots 1, 2 and the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and Lots
3, 4 and the S $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the NE $\frac{1}{4}$
of the SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of
Section 2.

Lot 1 and the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ except 7.14
Ac. Highway in Section 4.

The SE $\frac{1}{4}$ of Section 9.

The NE $\frac{1}{4}$ and the S $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the
SW $\frac{1}{4}$ except 11.5 Ac. Highway in Sec-
tion 11.

The SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ of the

Defendant's Exhibit Q—(Continued)

NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 12.

W $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13.

The N $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ ex. 5.15 Ac. Highway, W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 14, all in Section 15.

NE $\frac{1}{4}$ and the E $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of Section 22.

The SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 23.

16.08 Ac. in NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ des. Vol. 23, page 444, Deed; E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 24.

The NE $\frac{1}{4}$ and the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 25.

The NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 26.

W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 35.

The N $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Section 27, all in Township 39 South, Range 14 West, W.M., in Curry County, Oregon, at the agreed price of seventy-five thousand seven hundred eighty dollars thirty-one cents (\$75,780.31).

Said purchase price is to be paid as follows:

Fifteen thousand one hundred fifty-six dollars six cents (\$15,156.06) cash on signing of this agree-

Defendant's Exhibit Q—(Continued)

ment, receipt whereof is hereby acknowledged by the Seller, and the balance of sixty thousand six hundred twenty-four dollars twenty-five cents (\$60,624.25), payable in ten annual installments of six thousand sixty-two dollars forty-three cents (\$6,062.43), each together with interest from date hereof at the rate of 6% per annum, the first installment with interest payable on the 1st day of September, 1944, and a like installment with interest on the first day of September of each of the next nine succeeding years.

The Seller hereby agrees to convey said property to the Purchaser by a good and sufficient deed upon the payment of the said principle sum and interest in full, and upon the full compliance of the terms of this contract.

It is agreed that upon the execution and delivery of said deed to the Purchaser said Purchaser will pay to the Seller in addition to the above payments the sum of dollars sufficient for the recording of such deed.

It is agreed that the Purchaser shall have the right to possession and to the income from said premises so long as he shall not be in default in the performance of his part of this agreement, but shall forfeit his rights under this agreement and to all payments made pursuant thereto if he shall fail to pay said purchase price or any part thereof, principal or interest, at the time and in the manner herein specified, or shall fail to pay when due and payable the taxes hereafter levied against said

Defendant's Exhibit Q—(Continued)

premises; or shall commit or suffer any strip or waste on such premises, or cut or remove any timber or trees therefrom or buildings or improvements therefrom, or shall violate any other provisions of this Agreement.

The Seller hereby reserves easements over and through any and all of said property for the building of County roads, and,

That said reservation shall be one of the conditions of the Deed hereinafter to be executed by the Seller to the Purchaser as provided herein.

It is further understood by both parties, the Seller and the Purchaser, to this transfer that the above-described real property is to be placed upon the assessment roll by the assessor or sheriff for the year 1944.

In Witness Whereof, the Seller, pursuant to the resolution and Order of the County Court of Curry County duly and regularly adopted, and the authority vested therein by the Laws of the State of Oregon, has caused these presents to be signed and executed by its County Judge and County Commissioners, and attested by its County Clerk, and its name and seal to be hereunto affixed and the Purchaser has hereunto set his hand and seal this 1st day of September, 1943.

CURRY COUNTY, OREGON,
Seller.

/s/ A. H. BOICE,
County Judge.

Defendant's Exhibit Q—(Continued)

/s/ C. M. CLAYTON,
County Commissioner.

/s/ A. W. COPE,
County Commissioner.

/s/ S. A. AGNEW,
Purchaser.

Attest:

/s/ OLETA A. WALKER,
County Clerk.

State of Oregon,
County of Curry—ss.

Be It Remembered, That on this 15th day of October, A.D. 1943, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within-named S. A. Agnew who is known to me to be the identical individual described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and official seal the day and year last above written.

[Seal] /s/ HUBERT R. DEWART,
Notary Public.

State of Oregon,
County of Curry—ss.

Be It Remembered, that on this 1st day of September, A.D. 1943, before me, the undersigned, a

Defendant's Exhibit Q—(Continued)

Notary Public in and for said County and State, personally appeared the within-named A. H. Boice, County Judge, who acknowledged to me that he is the County Judge of Curry County, Oregon, and A. W. Cope and C. M. Clayton, who acknowledged to me that they are the County Commissioners of Curry County, Oregon, who are known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily and in the capacities therein set forth.

In Testimony Whereof I have hereunto set my hand and official seal the day and year last above written.

[Seal] /s/ HUBERT R. DEWART,

Notary Public for Oregon.

My Commission expires November 5, 1945.

[In Margin]: 9/1/44.

\$60,654.25

30.00

6,062.43

\$54,561.82

Bal. due on down pymt. & int., \$3,639.25.

[Longhand Margin]: Mr. Dewail has in contract \$150.00 more than was figured at sale. Letter of Nov. 15 explaining.

Defendant's Exhibit Q—(Continued)

State of Oregon,
County of Curry—ss.

I, Oleta A. Walker, County Clerk and ex officio Clerk of the Circuit Court of the County and State aforesaid, do hereby certify that the foregoing copy of Contract to Purchase Tax Title Property, Curry County, to S. A. Agnew, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original Contract as the same appears in the Files at my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 14th day of October, 1955.

[Seal] /s/ OLETA A. WALKER,
Clerk.

Received in evidence October 25, 1955.

DEFENDANT'S EXHIBIT W

Earnest Money Receipt
Crescent City, California

November 23, 1945.

Received of Sam J. Wilson, hereinafter mentioned as the purchaser, the sum of Five Thousand (\$5,000.00) Dollars as earnest money and in part payment for the purchase of the following-described

Defendant's Exhibit W—(Continued)

real estate situated in the County of Curry, State of Oregon, and more particularly described as follows, to wit: All that property described in a certain Bargain and Sale Deed to be executed by seller upon completion of final payment, copy of which is attached hereto and made a part of this agreement.

Which we have this day sold to the said purchaser for the sum of One Hundred Thousand (\$100,000.00) Dollars, on the following terms, to wit: The sum of Five Thousand (\$5,000.00) Dollars, as herein receipted for and Ninety-five Thousand (\$95,000.00) Dollars upon delivery of Bargain and Sale Deed.

The property is to be conveyed free and clear of all taxes, encumbrances or mortgage liens to date, taxes due and payable for the current fiscal year, to be prorated as of December 31st, 1945. The seller shall provide a Title Insurance policy issued by the Curry County Abstract Company of Gold Beach, Oregon, through the Commonwealth, Inc., of Portland, Oregon, showing the title to the property in said deed described to be merchantable and free from liens or encumbrances except last half of current taxes.

The purchaser shall pay for the evidence of title and continuation thereof when deed is delivered.

Should title to any particular parcel or parcels of said property be defective or unmerchantable, then the Escrow Holder shall withhold a sum equal

Defendant's Exhibit W—(Continued)

to \$25.00 per acre for the cost of perfection of title to said parcel or parcels, and in the event title cannot be perfected, a deduction from the total selling price shall be made at the above rate, and seller shall retain ownership of said parcel or parcels and purchaser agrees to execute quitclaim deed to said parcel or parcels.

In the event the said Title Company, in preparation of data in connection with the Title Insurance policy, find that the title to Twenty-five per cent (25%) or more of the parcels conveyed by the deed held in escrow is defective, or unmerchantable, then the Escrow Holder shall not pay the delinquent taxes and the purchaser shall be entitled to and shall receive a refund of monies paid into escrow, if the seller is unable to perfect the title within six (6) months from the time of title report unless the purchaser elects to accept the title in said condition.

Possession of said premises is to be delivered to the purchaser by delivery of deed. Time is the essence of this contract.

Further conditions are as follows: The seller further agrees with the purchaser to execute an assignment of that certain easement reserved for logging purposes over a 100-foot strip of land known as the North Fork spur and more particularly described in that certain deed issued by Brookings Land and Townsite Co., to Doyle Garvin and

Defendant's Exhibit W—(Continued)

Amanda Garvin, the use and conditions of said easement are to be the same as referred to in said deed recorded in Curry County Deed records, Vol. 27, page 313, which easement reads as follows: Subject, however, to a roadway easement one hundred (100) feet wide across said premises to be selected by the grantor which the grantor agrees to improve at its own expense for its own use, but agrees with the grantee herewith that such use shall be enjoyed equally by the grantee and their assigns together with Brookings Land and Townsite Company, the Delour Corporation and/or its assigns to be used on the same terms and conditions as set forth in that deed between the Brookings Land and Townsite Company and Doyle Isaac Garvin and Amanda E. Garvin recorded January 19th, 1940, Book 25 of Deed, Page 477, Records of Curry County, Oregon, which reads: Subject, however, reserving unto the Grantor, and/or its assigns a perpetual right and easement to construct and maintain a locked gateway road and to travel over and upon the same through said lands herein conveyed, but such use and travel shall not be exclusive and shall be used, exercised and enjoyed in common with the use and enjoyment thereof by the grantee herein, their successors and assigns. It is further and mutually agreed between the grantor and grantees herein named, the Delour Corporation or its assigns are to have a perpetual right and easement over said land for the purpose of trucking logs or any other practical logging method of

Defendant's Exhibit W—(Continued)

removing timber owned by the said corporation on adjacent lands and locked gateway need not apply during actual logging operations.

The said right and easement hereby granted and conveyed shall be appurtenant to those certain lands herein conveyed and other lands owned by the grantor in sections 34, 35 and 26, Township 40 South, Range 13 West, Willamette Meridian, Curry County, Oregon. It is understood and agreed between the grantor and grantee said right and easement shall be 100 feet in width, extending 50 feet on each side of the center line of the old California and Oregon, North Fork Chetco River Railroad right of way.

It is further agreed said right and easement strip as constructed shall be used by the grantor and grantees as a fence boundary, but no fence, however, shall be constructed to block the present roadway as now constructed, and the said easement shall run with the said lands and shall inure to the use and benefit of the successors in interest of the grantor and grantees herein, in the ownership of the said lands.

Purchaser is to pay the balance of the purchase price upon notice from the said Title Company of its readiness to issue its policy of title insurance in the sum of One Hundred Thousand (\$100,000.00) Dollars to purchaser. However, when the tax statements are received from the Tax Collector of Curry

Defendant's Exhibit W—(Continued)

County, Oregon, by the Escrow Holder, the purchaser agrees, upon demand, to furnish the said Escrow Holder sufficient funds to pay the delinquent taxes and his proportionate share of the current taxes to December 31st, 1945.

The Bank of America N. T. & S. A. of Crescent City, California, is to handle escrow papers and funds in connection with this transaction and deliver all papers at conclusion of sale.

/s/ SAM J. WILSON,
Agent.

I hereby agree to purchase.

/s/ S. A. AGNEW,
Purchaser.

I hereby agree to sell.

/s/ SAMUEL BANKUS,
Seller.

Received in evidence October 25, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify

that the foregoing documents consisting of Complaint; Answer; Pretrial Order; Memorandum of Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Order Extending Time to Docket Appeal; Designation of Contents of Record on Appeal, and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8011, in which the United States of America is the appellant and The United States National Bank of Portland (Oregon), Executor of the Estate of Sam J. Wilson, deceased, and Jessie Wilson are the appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith transcript of proceedings of October 25, 1955. The exhibits are being forwarded by the attorneys for the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this first day of May, 1956.

[Seal]

R. DeMOTT,
Clerk;

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 15120. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The United States National Bank of Portland (Oregon), Executor of the Estate of Sam J. Wilson, Deceased, and Jessie Wilson, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed May 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil Action No. 15120

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the
Estate of SAM J. WILSON, Deceased, and
JESSIE WILSON,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The above-named appellant, The United States of America, intends to rely on the following points on its appeal to the United States Court of Appeals for the Ninth Circuit:

1. The Findings of Fact made by the trial court in the above-entitled cause are erroneous in the following particulars:

(a) The trial court erred in finding (Findings of Fact, Par. III) that during the early part of the year 1943, Samuel J. Wilson entered into an oral agreement of joint venture with Samuel A. Agnew.

(b) The trial court erred in finding (Findings of Fact, Par. IV) that commencing in January, 1943, and continuing until June, 1946, Wilson, pur-

suant to the terms of said agreement of joint venture, performed the agreed personal services for the joint venture.

(c) The trial court erred in finding (Findings of Fact, Par. X) that the agreement between Agnew and Wilson of November 14, 1949, effected the dissolution of the joint venture theretofore existing between them and the conveyance of the timberlands to Wilson did not constitute a distribution of profits or anticipated profits of the joint venture.

(d) The trial court erred in deciding and finding (Conclusions of Law, Par. I) that the agreement between Agnew and Wilson of November 14, 1949, constituted the non-taxable dissolution of a joint venture and the fair market value of the proceeds thereof did not constitute compensation for Wilson's personal services and the conveyance of the timberlands to Wilson was a part of the division in kind between Agnew and Wilson of the assets of the joint venture.

(e) The trial court erred in finding (Conclusions of Law, Par. II) that the fair market value of the timberlands conveyed to Wilson in the year 1949 did not give rise to the receipt by him in that year of taxable income, except to the extent of the cash received by him.

(f) The trial court erred in failing to find and decide that the fair market value of the property and the cash received by Wilson in 1949 as a result

of the settlement of litigation then pending between Wilson and Agnew represented compensation for services rendered over a period of less than 36 months so as to render Section 107 of the Internal Revenue Code of 1939 inapplicable.

(g) In the alternative, the trial court erred in failing to find and decide that the fair market value of the property and the cash received by Wilson in 1949 as a result of the settlement of litigation then pending between Wilson and Agnew represented lost or anticipated profits taxable under Section 22(a) of the Internal Revenue Code of 1939.

(h) The trial court erred in entering judgment for appellee.

/s/ CHARLES K. RICE,
Assistant Attorney General;

By LEE A. JACKSON,
Acting Chief, Appellate
Section.

[Endorsed]: Filed May 2, 1956.

NO. 15120

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the Estate of
SAM J. WILSON, Deceased, and JESSIE WILSON,
Appellees.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLANT

JOHN N. STULL,
Acting Assistant Attorney General.

C. E. LUCKEY,
United States Attorney.

EDWARD J. GEORGEFF,
*Assistant United
States Attorney.*

ROBERT N. ANDERSON,
HARRY BAUM,
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Washington 25, D. C.*

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United States
COURT OF APPEALS

for the Ninth Circuit

NO. 15120

UNITED STATES OF AMERICA,

Appellant,

v.

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the Estate of
SAM J. WILSON, Deceased, and JESSIE WILSON,
Appellees.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum of decision, findings of fact, and conclusions of law of the District Court (R. 35-42) are not officially reported.

JURISDICTION

This appeal involves income tax for the year 1949 in the amount of \$361,852.06 plus interest. The tax in

dispute was paid on August 27, 1954 (R. 40). Claim for refund was filed on September 8, 1954, and rejected by notice dated January 5, 1955 (R. 41). Within the time provided in Section 6532 of the Internal Revenue Code of 1954 and on March 28, 1955, the taxpayer brought an action in the District Court for recovery of the tax paid (R. 3-9). Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on December 8, 1955 (R. 43-44). Within sixty days and on February 6, 1956, a notice of appeal was filed (R. 44-45). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in holding that the value of the property received by decedent in settlement of a lawsuit represented a nontaxable division of the assets of a joint venture, rather than taxable income.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains

or profits and income derived from any source whatever.

* * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * *

(13) *Partnerships.*—* * * If the property was distributed in kind by a partnership to any partner, the basis of such property in the hands of the partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property.

* * *

(26 U.S.C. 1952 ed., Sec. 113.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) *Partnership and Partner.*—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

* * *

(26 U.S.C. 1952 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.42-1. *When included in Gross Income.*—

(a) *In general.*— * * * If a person sues in one year on a pecuniary claim or for property, and money or property is recovered on a judgment therefor in a later year, income is realized in the later year, assuming that the money or property would have been income in the earlier year if then received. * * *

Sec. 29.113(a)(13)-2. *Readjustment of Partnership Interests.*—When a partner retires from a partnership, or the partnership is dissolved, the partner realizes a gain or loss measured by the difference between the price received for his interest and the sum of the adjusted cost or other basis to him of his interest in the partnership plus the amount of his share in any undistributed partnership net income earned since he became a partner on which the income tax has been paid. * * * If the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received in liquidation. The basis of such property in the hands of the partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property.

* * *

STATEMENT

Taxpayers here are the executor of the estate of Sam J. Wilson, deceased, and his widow. The controversy concerns the taxable nature of certain transfers of timberlands to Wilson in 1949. The facts may be summarized as follows:

In 1943 Wilson entered into an oral agreement, the nature of which is here in dispute, with Samuel A. Agnew, under which Wilson located various timberlands, recommended their purchase to Agnew, and arranged for their

purchase. Agnew supplied the funds for the purchase of the lands and the purchases were made in his name. This arrangement continued until some time in 1946, when a disagreement arose between Wilson and Agnew (R. 37-38).

In July, 1948, Wilson instituted suit against Agnew in the Superior Court of the State of California for the County of Del Norte, alleging that his arrangement with Agnew was a joint venture, that under the terms of it the timberland had been purchased for resale at a profit, that he was entitled to 50% of the profit on land acquired at tax sales and 20% of the profit on land acquired from private owners. He prayed that the joint venture be established, that his interests be determined, and that there be a liquidation by sale or division in kind. Agnew denied the existence of the joint venture, and in a cross-complaint alleged that Wilson had used Agnew's money to purchase lands in his own name and had diverted to his own use sums advanced by Agnew for the purchase of land for Agnew (R. 15-17, 38-39). Agnew also filed suit in the same court, alleging a breach by Wilson of a separate agreement relating to the purchase of a hotel (R. 17-18).

After one day of trial of the consolidated cases, the dispute between the two was settled. The stipulation of settlement provided in part that Agnew was to convey to Wilson a tract of timber located in Curry County, Oregon, and a tract located in Humboldt County, California. Pursuant to the settlement Wilson also retained \$25,000 previously advanced by Agnew (R. 19, 39). Wil-

son was to convey to Agnew a tract of land purchased in his own name (R. 19). All pending litigation between the parties was to be dismissed and all claims released (R. 39, 186). The settlement was carried out.

In their joint income tax return for the year 1949 Wilson and his wife, Jessie Wilson, reported the \$25,000 cash as income for that year, but treated the receipt of the tracts of land as a nontaxable dissolution of a joint venture (R. 40).

Under date of July 14, 1954, the Commissioner notified taxpayers of a deficiency for 1949 in the amount of \$361,852.06 and an over-assessment for 1950 for \$16,789.84. The basis for the deficiency was the assertion that 70% of the fair market value of the timberlands conveyed to Wilson by Agnew (the remaining 30% being received by the attorneys for Wilson) constituted the receipt by Wilson of compensation for services rendered rather than the receipt of property in dissolution of a joint venture (R. 40). The net amount assessed, plus interest was paid by taxpayer. The United States National Bank of Portland (Oregon), as executor of the estate of Wilson, claim for refund was duly filed and disallowed, and this action followed (R. 40-41).

The principal issue in the court below was as to the taxable nature of the transfer of the timberlands from Agnew to Wilson in 1949. The court held that the agreement between Wilson and Agnew was one of joint venture (R. 35, 37-38), that the agreement of settlement was a dissolution of the joint venture (R. 41), and that the conveyance of the timberlands was a nontaxable

division in kind of the assets of a joint venture (R. 41, 42).

A second issue before the court was as to the fair market value of the tracts in question, to be determined if the court should decide that their fair market value constituted compensation for personal services or other income to Wilson (R. 29). The court made no determination of this issue.

A third issue, also to be determined in the event that the timberlands constituted compensation to Wilson, was as to the length of time over which those services were performed. If over three years, then the benefits of Section 107(a) of the Internal Revenue Code of 1939 were applicable (R. 29). The court found that Wilson performed personal services, commencing in January, 1943, and continuing until June, 1946 (R. 38).

STATEMENT OF POINTS TO BE URGED

1. The court below erred in finding, contrary to the evidence and to the law applicable to joint ventures, that Wilson entered into a joint venture with Agnew (Finding III, R. 37), that Wilson performed the agreed personal services for a joint venture (Finding IV, R. 38), and that the settlement agreement effected the dissolution of a joint venture (Finding X, R. 41).

2. In finding (Finding X, R. 41) that the conveyance of the timberlands to Wilson did not constitute a distribution of profits or anticipated profits, the court erred for the reasons that there was no joint venture and,

alternatively, that the settlement was of a claim for profits.

3. In deciding (Conclusion I, R. 42) that the agreement between Agnew and Wilson of November 14, 1949, constituted a nontaxable division in kind of the assets of a joint venture and that the fair market value of the settlement proceeds did not constitute compensation for Wilson's personal services, the court below erred for the reasons that there was no joint venture and, alternatively, that the conveyance was part of a settlement of a claim for profits only.

4. In deciding (Conclusion II, R. 42) that the fair market value of the timberlands conveyed to Wilson in the year 1949 did not give rise to the receipt by him in that year of taxable income, the court below erred for the reason that the evidence shows that the conveyance was compensation for personal services.

5. In the alternative, the court below erred in failing to decide that the fair market value of the property and cash received by Wilson under the settlement represented loss of anticipated profits taxable under Section 22(a) of the Internal Revenue Code of 1939, for the reason that the claim in the state court proceeding was for profits.

7. The trial court erred in entering judgment for the taxpayers.

SUMMARY OF ARGUMENT

The District Court's conclusion that the arrangement between Wilson and Agnew was one of joint venture, and that consequently the value of the property received by Wilson in settlement of the lawsuit represented a nontaxable division of the assets of a joint venture, is without support in the record and clearly erroneous. Among the essential elements of a joint venture are the sharing of losses as well as profits, a joint proprietary interest in the assets of the enterprise, and the right of joint control of the common enterprise. The record fails to establish the existence of any of these prerequisites, and accordingly taxpayer failed to meet the burden of proving the existence of a joint venture. On the contrary, the record affirmatively shows that the arrangement in question was one of employment, whereby Wilson was to furnish services for Agnew in locating and purchasing timberlands for resale, for which he was to receive compensation measured by a percentage of the resale profits. Wilson's legal characterization of this oral arrangement as a joint venture in his lawsuit against Agnew patently does not (as the court below apparently assumed) suffice to establish the existence of a joint venture, particularly since Agnew flatly denied the creation of any such relationship. Nor is there anything in the settlement agreement itself which lends any support to the claim of a joint venture. The mere general assertion in Wilson's complaint in the state court litigation that a joint venture was created is no more determinative of the taxable nature of the amount received in settlement of the litiga-

tion than Agnew's denial of the assertion. The specific allegations of the complaint and the conduct of the parties as disclosed by their testimony make it clear that Wilson never acquired a proprietary interest in the properties purchased with Agnew's funds and in Agnew's name, but at most acquired a claim against Agnew for compensation measured by a percentage of profits to be derived from resale of the properties.

Even assuming, *arguendo*, that a joint venture did exist, the District Court erred in further concluding that the value of the property received by Wilson in settlement of the litigation constituted a division in kind of the assets of the joint venture, rather than damages for loss of profits resulting from Agnew's alleged breach of the joint venture agreement. While Wilson's suit was broad enough to embrace both aspects of recovery, the settlement agreement is completely silent regarding the basis on which the parties compromised their dispute. Taxpayer had the burden of proving that the settlement proceeds represented a nontaxable division of property owned by him as a joint venturer rather than a recovery of lost profits of the joint venture, and on the record here presented his proof falls far short of meeting that burden.

ARGUMENT

The Settlement Proceeds Represented Taxable Income, Not a Nontaxable Division of Profits of a Joint Venture

The decedent Wilson and one Agnew entered into an oral agreement in 1943 under which Wilson undertook to locate timberlands which would be suitable for profitable resale. The purchase money was to be furnished, and title was to be taken, in Agnew's name. The property was to be resold within a reasonable time and Wilson was to receive a stated percentage of any resale profits. Wilson performed the agreed services, various timberlands being purchased in Agnew's name with funds supplied by Agnew. None of the properties having been resold by 1946, a disagreement arose between the parties and thereafter Wilson brought suit against Agnew in a California court. His complaint alleged that he and Agnew had entered into an oral joint venture agreement, and that Agnew had breached the agreement by failing to resell the properties. He requested that the court declare the existence of a joint venture, that his interest be determined, and that the property either be divided in kind or liquidated and sold. Agnew denied the existence of a joint venture, and any interest of Wilson in the timberland; he also filed a cross-complaint. The litigation was terminated by a settlement agreement, pursuant to which Wilson received from Agnew cash plus certain timberlands. The settlement agreement merely provided for conveyance of the properties to Wilson and mutual exchange of releases; it was silent as to the nature of the

controversy being settled and as to what the settlement payment represented (R. 15-19, 36-41, 185-186).

If the value of the property received by Wilson in settlement of the controversy constituted compensation for his services performed for Agnew, or if it represented damages for loss of anticipated profits of a joint venture, the amount received represented income taxable to Wilson under Section 22(a) of the Internal Revenue Code of 1939, *supra*. On the other hand, if the settlement represented merely a division in kind of property owned jointly by Wilson and Agnew as joint venturers, then no taxable gain was realized by Wilson by reason of the division. See Section 29.113(a)(13)-2 of Treasury Regulations 111, *supra*.

The District Court, sustaining taxpayer's contention, summarily held that the settlement proceeds did not constitute taxable income to Wilson (except to the extent of the cash received), but represented a nontaxable division of the property of a joint venture (R. 35, 42). It is the Government's position that the decision below is clearly erroneous on either of two grounds: (1) Far from establishing that the property received in settlement of the lawsuit represented a division of the assets owned by Wilson and Agnew as joint venturers, the record shows that it represented compensation for services performed by Wilson for Agnew; (2) Even if it be assumed that the relationship of the parties was in reality that of joint venturers rather than one of employment, the record fails to show that the settlement proceeds represented Wilson's proprietary interest in the venture rather than

damages for profits lost by reason of Agnew's failure to carry out the joint venture agreement.

A. The court below erred in concluding that a joint venture, rather than an employment relationship, existed between Wilson and Agnew.

The basic controversy here is whether the arrangement between Wilson and Agnew constituted a joint venture. If it did not, then the value of the timberlands received by Wilson clearly constituted taxable compensation for personal services.*

In the court below taxpayers urged that inquiry into the question whether a joint venture existed or not was foreclosed by the settlement in the state court proceeding. The court below, in its memorandum of decision (R. 35), expressed doubt as to the applicability of the authorities relied on by taxpayers but found, independently, "on the record made," that Wilson and Agnew were engaged in a joint venture. We submit that this finding is clearly erroneous, is without support in the record, and indeed is contrary to the overwhelming weight of the evidence.

The court below disregarded established criteria for determining the existence of a joint venture. It is the general rule that among other essentials, there must be a sharing of losses as well as profits and a joint right of control. See, for example, *Gottlieb Brothers v. Culbertson's*, 152 Wash. 205, 209, 277 Pac. 447; *Beckwith v.*

*As discussed in part B, below, even if the agreement constituted a joint venture of some sort, the conveyance of the lands was not necessarily a division of its assets in kind.

Talbot, 2 Colo. 639, 645; *Burton-Sutton Oil Co. v. Commissioner*, 150 F. 2d 621, 628 (C. A. 5th); *Place v. Commissioner*, 17 T. C. 199, 206, affirmed, 199 F. 2d 373 (C. A. 6th); *Rupple v. Kuhl*, 177 F. 2d 823 (C. A. 7th); *Aiken Mills v. United States*, 144 F. 2d 23, 25 (C. A. 4th).

This court, in *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, summarized the requirements of California law for a joint venture as follows (p. 871):

Both petitioner and respondent assume, and rightly so, that California law governs as to the meaning and effect of the agreement above outlined since the contract was made in California and was to be performed and was wholly performed in that state. The courts of California, in common with other courts, have not precisely defined the term "joint adventure", but they have prescribed what are to be regarded generally as its essential elements. *Beck v. Cagle*, Cal. App. [46 C. A. 2d 152, 161], 115 P. 2d 613. Actual joint control, or at least the right of joint control of the common enterprise is an essential element of joint adventure in California. *Howard v. Societa Di Unione E. Beneficenza Italiana*, 62 Cal. App. 2d 842, 145 P. 2d 694; *Freedman v. Industrial Accident Commission*, Cal. App. [67 C. A. 2d 629], 154 P. 2d 922; *Wiltsee v. California Employment Commission*, Cal. App. [69 C. A. 2d 120], 158 P. 2d 612; *Mazzer v. Wolf*, Cal. App., 173 P. 2d 44. An arrangement whereby two or more persons share the profits of a common undertaking does not constitute a joint adventure in the absence of power of joint control. *United Farmers Ass'n v. Sakioka*, 7 Cal. App. 2d 559, 46 P. 2d 770; *Larson v. Lewis-Simas-Jones Co.*, 29 Cal. App. 2d 83, 84 P. 2d 296; *Enos v. Picacho Gold Mining Co.*, 56 Cal. App. 2d 765, 133 P. 2d 663. Where there is no common management and control of the enterprise and

the profits are shared only as compensation or interest for the use of money advanced, no joint adventure exists. *Spier v. Lang*, 4 Cal. 2d 711, 53 P. 2d 138. The sharing of losses as well as profits has also been regarded as an essential element of joint adventure. *Stoddard v. Goldenberg*, Cal. App. [48 C. A. 2d 319, 324], 119 P. 2d 800; *Enos v. Picacho Gold Mining Co.*, *supra*.

Howard v. Societa di Unione etc. Italiana, 62 Cal. App. 2d 842, 145 P. 2d 694; *United Farmers Ass'n v. Sakioka*, 7 Cal. App. 2d 559, 46 P. 2d 770; *Freedman v. Industrial Accident Commission*, 67 Cal. App. 2d 629, 154 P. 2d 922, and *Motion Picture Enterprises v. Pantages*, 91 Cal. App. 677, 682, 267 Pac. 550, also hold that there must be a sharing in losses.

Similarly, in Oregon it is held that there must be a sharing of losses (*Gong v. Toy*, 85 Ore. 209, 166 Pac. 50) and that sharing of profits is not enough (*First Nat. Bank of Eugene v. Williams*, 142 Ore. 648, 20 P. 2d 222; *H. H. Worden Co. v. Beals*, 120 Ore. 66, 73-74, 250 Pac. 375).

Closely similar to the arrangement between Wilson and Agnew, assuming that Wilson was in fact to share in the profits, which Agnew denied, is the arrangement involved in *Griffiths v. Von Herberg*, 99 Wash. 235, 240, 169 Pac. 587. There the plaintiff was employed to obtain a suitable building and a ten-year lease for a moving picture business, and was to receive 10% of the profits of the business. It was held to be not a joint venture, but merely a specific employment with compensation fixed by a percentage of the profits.

Turning to the evidence in the present case, it is abundantly clear that there was no joint venture here, but at most an agreement to compensate Wilson for his services by a share in the profits. We believe that this Court "on the entire evidence" will be "left with the definite and firm conviction that a mistake has been committed", and that the evidence overwhelmingly shows that Wilson merely received compensation. *United States v. Gypsum Co.*, 333 U.S. 364, 395.

The record is to be searched in vain for any evidence which supports the view that the parties contemplated that Wilson would share in any losses that might occur, for example, through a decline in the value of the timberland. Nor is there anything to support a conclusion that Wilson had any voice in the management or disposition of the timberlands once they were acquired by Agnew. The evidence consists of a deposition of Wilson, taken July 23 and 24, 1948, in the state proceedings (R. 240-329), copies of correspondence between Wilson and Agnew during the continuance of their arrangement and at the time of their dispute as to their respective rights (R. 329-390), Agnew's testimony in the state proceedings (R. 100-183), and a deposition of Agnew in the present tax case (R. 187-227).

The deposition of Wilson, while confusing as to the details of the specific transactions there inquired into, reveals that his relationship with Agnew was not that of a joint venturer. It contains nothing from which it could be inferred that Wilson was to share in the control of the property or its disposition. On the contrary, it shows

that Wilson was acting as a broker. The very most that can be said, based upon the statement that "I was to get a cut on the property" (R. 315), is that Wilson was to be paid for his services out of the profits.

As for the miscellaneous correspondence (R. 329-390), in a letter to Agnew of July 30, 1944, Wilson refers to the Lobster Creek tract which "I sold you" (R. 333). His letters of October 24 and November 7, 1944, to Agnew made various suggestions in terms which are those of an agent to his principal and not those of a joint venturer (R. 336-341). A letter of January 4, 1945, refers to "your holdings," with no indication that they are "our" holdings (R. 343). The other letters are in similar vein. (See R. 344-345, 352; 368-369, 375.)

Apparently at some time early in 1946 there arose differences between Wilson and Agnew, differences which finally resulted in the lawsuit. Wilson's letters at that time indicate his view of their arrangement. One to Agnew of June 19, 1946 (R. 361-365), reads in relevant part as follows:

I have stuck along with you for three years and done a damn good job, if I do say so myself—bought your timber for nothing and you could sell out today for a couple of million profit. Now Sam, if you are willing to give me a chance to work out our original deal, I am willing to go along, otherwise I'm not much of a hand to stick along on a losing proposition that should be making money.

* * *

In final conclusion, I feel I have done a damn good job and it is now time I began to look out for my own interests. The timber was bought right and now is the time to sell. I have no hesitancy in pre-

dicting that within the next two to three years you can buy it back for one-half of what *you* can sell it for today.

I want you to give this a little thought. There is no hard feelings. I just feel the whole thing is too much of a one-man show. I feel I warrant your trust and with my ability and experience, I am going to be of value to somebody. (Emphasis supplied.)

On July 12 and July 28, 1946, Wilson wrote Agnew suggesting a talk about their affairs (R. 370, 371). On March 6, 1947, reminding Agnew that he always was given "first call on any timber deals" that came to Wilson's attention, Wilson wrote him about a possible purchase (R. 374-376).

In a letter of April 16, 1947, Wilson wrote Agnew demanding a settlement (R. 378-383), the letter reading in relevant part:

Now my dealings are with you, and all the properties purchased are in your name and so far as I know still are, and it is you I am looking to for a settlement.

The timber I purchased for approximately \$350,000 is now worth and can be sold for more than five times that amount which you should know, Sam, any court of equity will recognize if that is the way you want it, and it is time some kind of a settlement is arrived at.

* * *

So your "people," as you refer to them, must understand that the man who made it possible to purchase this timber at the ridiculously low price referred to, is going to be paid as per our agreement.

* * *

So you will understand, Sam, why I feel that 3½ years of my best effort is worth money. All you

have to do is just look up my past earning power which you will find when I worked was well over \$50,000 per annum and I surely worked for 3½ years on this deal.

Now all I want is a fair and equitable settlement and let's get down and figure it out.

In all of this there is not a suggestion of a joint venture, nothing from which to infer that Wilson was sharing a risk of loss or was asserting a right to a voice in the control of the property. Here, as in his deposition, there is at most a claim to share in the profits of the sale of the land, as compensation for his past services.

The other evidence is likewise contrary to the claim of joint venture. A letter, apparently from Agnew, dated July 9, 1947, in reply to Wilson's letter of April 16, 1947, last quoted above, completely rejected his claim (R. 385-386). The answer and cross complaint in the California lawsuit, also completely denied the existence of a joint venture (Ex. 2, Appendix, *infra*).

Even the specific allegations in the complaint filed by Wilson in the state court action (Appendix, *infra*), as distinguished from the general legal conclusions asserted therein, refute the notion that the parties were joint venturers and are entirely consistent with the view that Wilson performed services for Agnew for a compensation measured by a percentage of the profits from re-sales. While the complaint alleges (Par. III) that there was "an oral agreement of joint adventure" in describing the terms of the alleged arrangement, there is no reference to a possible sharing of losses. Moreover, the gen-

eral allegations in the complaint characterizing the relationship of the parties as that of joint venturers is entitled to no greater probative force for purposes of determining the taxable nature of the settlement proceeds than Agnew's unequivocal denial of those allegations in his answer (Appendix, *infra*), especially since the settlement agreement itself (R. 184-186) contains no indication of the basis of the compromise or the nature of the settlement payment.

In Agnew's deposition (R. 187-225), taken in connection with the present tax case, he testified that his arrangement with Wilson was that Wilson bought timber and sold it to him (R. 192, 199, 200, 220), and that Wilson was to be paid by the seller of the timber (R. 195, 204). He testified also that he purchased the timber for manufacturing and not for resale (R. 198), and that Wilson was opposed to the purchase of timber at tax sales and had little to do with such purchases (R. 193, 197, 204, 216).

Similarly in testifying in the California case in November, 1949 (R. 100-183), Agnew testified that he bought timber from Wilson (R. 104, 113), that there was no discussion of any deal of disposing of timberland at a profit (R. 109), that he was buying the timber for manufacture and not for resale (R. 113), that Wilson was to get his commission from the seller (R. 126), and that Wilson was a broker (R. 125, 180). As to the tax sales, Agnew testified that Wilson recommended against the purchase (R. 115, 116, 123, 125) but that after Agnew had decided to go ahead Wilson was given permission to

do the bidding and handle the transfer as a means whereby Wilson could build up his reputation (R. 125, 126, 137, 147).

In the trial of the present case, one witness with whom Wilson negotiated testified that he held himself out as agent for Agnew (R. 63, 64, 65) and that as seller he did not pay Wilson a commission (R. 76). See also Exhibit W (R. 402-407).

There is in the testimony of Agnew nothing from which could be drawn an inference that Wilson had any interest at all in the timber after it was purchased by Agnew, far less that it could be an interest of a joint venturer.

On the crucial questions of sharing of losses and of joint power of control of the property, there is not only no conflict of evidence, there is no evidence whatever. Such conflict as there is exists with respect to the question whether Wilson was to receive any compensation at all from Agnew, or was to get his compensation from the sellers. Indeed, there is some indication in Wilson's own testimony that in some cases at least he made a profit independently by purchasing timber and reselling it to Agnew (R. 289-293).

In short, not only is there no evidence to contradict the Commissioner's determination that the amount received by Wilson in 1949 was compensation for personal services, rather than a distribution of assets held by a joint venture; the evidence overwhelmingly supports the Commissioner's determination. Accordingly, we respectfully submit that the conclusion of the court below that

a joint venture existed is clearly erroneous, as a matter of law, even under the facts of this case taken most favorably to the taxpayers. Taxpayers clearly failed to meet their burden of showing that the Commissioner's determination was wrong.

B. Even assuming that a joint venture existed, the court below erred in concluding that the settlement proceeds represented a property division rather than damages for loss of profits.

Even assuming, *arguendo*, that a joint venture was created, the District Court erred in further concluding that the value of the property received by Wilson in settlement of the state court litigation represented a nontaxable division in kind of the assets of the joint venture, rather than damages for loss of profits resulting from Agnew's alleged breach of the alleged oral joint venture agreement. While it is arguable that the allegations in Wilson's complaint were broad enough to encompass both theories of recovery, the crucial fact remains that the settlement agreement is silent as to the basis for the compromise. Taxpayer, of course, had the burden of proving that the settlement proceeds constituted a nontaxable division of properties owned by Wilson and Agnew as joint venturers, rather than a recovery of the proceeds which he claimed would have been earned by the joint venture but for Agnew's violation of the alleged joint venture agreement. On the record here presented that burden clearly has not been met.

It is not disputed that if the property Wilson received in the settlement was in lieu of profits its value was income to Wilson in 1949 and taxable to him as such. *H. Liebes & Co. v. Commissioner*, 90 F. 2d 932 (C. A. 9th). Taxpayers argued below, however, that the conveyance to Wilson was part of a division in kind of the assets of a joint venture (R. 25, 28) and therefore that under Section 29.113(a)(13)-2 of Treasury Regulations 111 (*supra*) no gain or loss was realized. In determining this question, in the light of the state court litigation, both Commissioner and taxpayers in the court below relied on the principle that whether the net proceeds of litigation are taxable to the recipient as income or constitute a nontaxable return of capital "depends upon the object for which the suit was brought." If brought to recover "lost profits, the proceeds are taxable as income;" if brought "for loss or damage to capital, the proceeds are nontaxable." *Durkee v. Commissioner*, 162 F. 2d 184, 186 (C. A. 6th). See also *H. Liebes & Co. v. Commissioner*, *Supra*; *Raytheon Production Corp. v. Commissioner*, 144 F. 2d 110, 113 (C. A. 1st), certiorari denied, 323 U. S. 779; *Arcadia Refining Co. v. Commissioner*, 118 F. 2d 1010 (C. A. 5th); *Farmers' & Merchants' Bank v. Commissioner*, 59 F. 2d 912, 913 (C. A. 6th); *Jones v. Corbyn*, 186 F. 2d 450 (C. A. 10th). Where, for example, the settlement of a patent infringement suit represents lost profits rather than damage to capital, the recovery is taxable income. *United States v. Safety Car Heating Co.*, 297 U. S. 88; *Mathey v. Commissioner*, 177 F. 2d 259 (C. A. 1st). Where the basis of the compromised claim is not an injury to capital but default in the

payment of money or delivery of property which would clearly have been gain in the first instance, the settlement cannot be said to be in restoration of capital. *Swastika Oil & Gas Co. v. Commissioner*, 123 F. 2d 382, 384 (C. A. 6th). In determining the nature of the recovery, the courts look at the claims of the plaintiff in the prior lawsuit. *Lyeth v. Hoey*, 305 U. S. 188; *Helvering v. Safe Deposit Co.*, 316 U. S. 56; *Commissioner v. Goldberger's Estate*, 213 F. 2d 78 (C. A. 3d); *Farmers' & Merchants Bank v. Commissioner*, *supra*.

Taxpayers in the court below argued in effect that in the tax case the court is bound by the labels placed on the claims in the prior suit. We do not read the cases as so restricting the court in the subsequent tax case. Rather that the court can look at the earlier case to see what it was that the taxpayer was really looking for. In *Lyeth v. Hoey*, 305 U. S. 188, 197, the Court emphasized that in the earlier action the plaintiff was taking more than merely a "bargaining position." "He was an heir in fact." See also *Mathey v. Commissioner*, *supra*; *Durkee v. Commissioner*, *supra*; and see *Parr v. Scofield*, 185 F. 2d 535, 536-537 (C. A. 5th).

In determining the nature of Wilson's claim in the state proceedings, the stipulation for settlement (R. 185-186) is completely inconclusive. It provides for the transfer from Agnew to Wilson of the tracts of land here in question. It also called for the transfer by Wilson to Agnew of the Thorp tract, which Agnew in his cross complaint (Par. II, Appendix, *infra*) alleged that Wilson had purchased in his own name with Agnew's money. It also called for the release of all claims of each against the

other, resulting in the retention by Wilson of \$25,000 advanced by Agnew for a deal which fell through (R. 300-301). The stipulation does not recite the contentions of the parties or the basis of the settlement. Similarly the testimony in the present case of Agnew's attorney as to the reason for the settlement is inconclusive (R. 68, 74-75). Nowhere is there any recognition of Wilson as having a property interest in a joint venture.

Furthermore, examination of the amended complaint itself (Ex. 2, Appendix, *infra*) makes it abundantly clear that the true nature of Wilson's claim was for profits. The complaint (Par. III) repeatedly recites that the lands were purchased for resale "at a profit," that they were to be sold within a reasonable time "for profit" that "such profits" were to be divided equally in the case of lands purchased at tax sales, and that "all profits" from the sale of other lands were to be divided, 80% to Agnew and 20% to Wilson. Wilson complained that the lands could have been sold "at a large profit," that he could sell them "at a large and substantial profit," and that Agnew had "deprived plaintiff of the expected profits and the profits that he is entitled to * * *" (Par. VII). Wilson's prayer for relief was in substance that he receive a portion of the lands in question to the extent of his interest therein, i.e., a percentage of the profit, or that in the event of sale he receive the specified percentages of the amount received after deducting Agnew's expenses, i.e., the profit.

Even if it be assumed therefore that the arrangement between the two amounted to a joint venture, it is clear

that what Wilson was seeking was not a division of the assets of the joint venture but a division of its (unrealized) profits. Again assuming that there was a joint venture, it is clear that Wilson was not claiming an interest in the assets themselves, but only in the lost profits. On Wilson's own statement of the arrangement between the two, if there were no profits he had no claim for anything.

Unlike cases like *Durkee v. Commissioner, supra*; *Jones v. Corbyn, supra*, and *Mathey v. Commissioner, supra*, where the problem was one of determining whether a recovery should be attributed to loss of profits or to impairment of a capital asset, here Wilson had no capital asset. There was no going business, goodwill, patent or other asset which had been impaired, and which had now been made whole. If it be argued that Wilson's interest in the alleged joint venture was itself a capital asset, we then are brought back to the fact that that interest was only a claim to damages for loss of profits never realized by the joint venture, and that the recovery was merely a satisfaction of the claim to profits. That Wilson received property (in lieu of cash) in settlement of his claim does not transform the value of the property received from taxable income into a non-taxable distribution in kind of the assets of a joint venture.

In the tax cases cited above, the courts have looked at the earlier litigation in order to determine the issue before them—what is the true nature of the recovery, does it represent income or the return of capital? If we

do the same here, it is evident that the nature of the recovery is one for profits, and is income and not the return of capital.

CONCLUSION

The decision of the court below should be reversed and the case remanded for a determination of the fair market value of the property received by the decedent.

Respectfully submitted,

JOHN N. STULL,
Acting Assistant Attorney General.
 ROBERT N. ANDERSON,
 HARRY BAUM,
 DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington 25, D. C.

C. E. LUCKEY,
United States Attorney.

EDWARD J. GEORGEFF,
Assistant United States Attorney.

AUGUST, 1956.

APPENDIX

Plaintiff's Exhibit 2

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, IN AND FOR THE COUNTY
OF DEL NORTE.

SAMUEL J. WILSON,)	
Plaintiff,)	
v.	)	NO. 4060
	)	AMENDED COMPLAINT
SAMUEL A. AGNEW,)	
Defendant.)	

Now comes the above-named plaintiff, and for cause of action against the defendant herein alleges:

I

That for a great many years prior to the date of an agreement hereinafter alleged, plaintiff has from time to time followed the occupation of cruising of timber for the purpose of ascertaining the quantity and quality of merchantable and useable lumber therein; that during said period of time he was and is familiar with fir and other varieties of timber; that from his work, experience and knowledge he was able to ascertain the quality and quantity of growing timber, its accessibility for logging for the manufacture thereof into timber products, and was generally familiar with the business of buying and selling timber and timberlands, determining the quantity of timber upon lands and its possibility for profitable use in the manufacture of its products.

II

That for a number of years prior to the time hereinafter alleged, the defendant, SAMUEL A. AGNEW, operated mills for the manufacture of lumber, dealt in timberlands, and at the time of the agreement hereinafter alleged, and for a considerable period of time prior thereto, wanted to acquire interest in timberlands in the States of California and Oregon for the resale thereof at a profit.

III

That on or about the 15th day of May, 1943, the plaintiff, SAMUEL J. WILSON, and the defendant, SAMUEL A. AGNEW, made and entered into an oral agreement of joint adventure by the terms of which said plaintiff and defendant mutually agreed that plaintiff would search for and examine various timberlands, locate the same, determine their suitability for purchase for logging for the manufacture of lumber or resale at a profit, and would ascertain from public records, particularly in the County of Curry, Oregon, and the Counties of Del Norte, Trinity, and Humboldt, California, descriptions of lands that might be purchased by plaintiff and defendant from the States of Oregon and California, or counties or other political subdivisions thereof, secure the offering of such lands by such governmental agencies holding title thereto, bring about the sale of said lands by such states, counties, or political subdivisions thereof according to the governing law pertaining thereto and bid for such timberlands at such sales for the joint use and benefit of plaintiff and defendant. It was mutually agreed that plaintiff was to purchase, if the

price thereof did not exceed Five Dollars (\$5.00) per acre, for the joint use and benefit of plaintiff and defendant such timberlands in the State of California and Oregon, some of which lands had theretofore been acquired by the aforesaid states, counties or political subdivisions thereof by reason of taxes having been unpaid and delinquent thereon, or would acquire timber and timberlands at tax sales, and that the plaintiff and defendant would negotiate for, attempt to acquire and acquire timberlands in the States of California and Oregon, which lands were designated as privately owned lands, from the owners thereof. Plaintiff was to approach the owners of such privately owned land for the purpose of ascertaining if said lands were for sale at a price that would permit plaintiff and defendant to purchase them and resell them within a reasonable time at a profit and, if so, to acquire such privately owned timberlands. It was understood and agreed between plaintiff and defendant that any and all said lands so purchased by the plaintiff and defendant was to be sold within a reasonable time for profit; it was agreed between plaintiff and defendant that the defendant, from his own funds, was to advance the purchase price of all such lands purchased pursuant to the terms of such oral agreement, and to thereafter pay taxes accruing or accumulating on said lands during the period of time such timberlands were so held, and that upon the sale of said timber and timberlands pursuant to such agreement and at a profit, there was first to be deducted from the sale price thereof any sums advanced by defendant for the purchase of said lands or in the payment of taxes, to-

gether with interest thereon, at the rate of five per cent (5%) per annum. That such profits so accruing from said sales of any timberlands acquired by plaintiff and defendant under such joint adventure agreement that had been acquired from any state, county or political subdivision of any state at tax sale or which was purchased from any state, county or political subdivision of any state which had acquired such timberlands for delinquent taxes were to be divided equally between the plaintiff and defendant, and that all profits derived from the purchase and sale of timberlands by plaintiff and defendant from private owners were to be divided on the basis of eighty per cent (80%) thereof to the defendant, SAMUEL A. AGNEW, and twenty per cent (20%) of such profit to plaintiff. It was agreed that plaintiff would look for purchasers and negotiate for the sale of such timberlands so acquired, and that plaintiff would do and perform any and all other necessary work and labor required of him in connection with the purchasing and disposing of said timberlands.

IV

That after the making of the above described oral agreement of joint adventure between plaintiff and defendant, and in pursuance and performance of such agreement, plaintiff, at his own cost and expense, maintained an office, employed secretarial help, maintained a telephone, conducted correspondence, cruised, and caused to be cruised, timberlands, caused such timberlands to be surveyed, searched public records to determine what timberlands might be purchased from states, counties or political subdivisions thereof, and what tim-

berlands might be sold by such governmental agencies on account of unpaid delinquent taxes, went upon and examined numbers of tracts of timberlands, assembled small, variously owned tracts of timber into blocks of timber so that the same might be suitable for logging operations or resale, secured rights of way, travelled to various places to interview the owners of privately owned timberlands, and since on or about May 15, 1943, has devoted practically all of his time to the performance of carrying out the purposes and objects of such agreement, and continued to perform many other and numerous items and details necessary and required in the negotiating and consummating the acquisition of the timberlands hereinafter described. For the purpose of carrying out and putting into effect such joint adventure agreement, plaintiff has expended a large amount of time, effort and money.

V

That in pursuance and in the performance of said agreement, and with the moneys advanced by defendant, and as the result of the performance of the terms of the above agreement, the plaintiff and defendant have acquired and now hold, subject to the terms of their joint adventure agreement as hereinbefore alleged, timber, timberlands and premises located in the Counties of Del Norte, Trinity, and Humboldt, California, and in Curry County, Oregon; said timber and timberlands are more particularly described in "Exhibit A" attached hereto and made a part hereof, in which tax title land and land acquired from private owners are particularly designated. All of such timber and timberlands are held sub-

ject to the terms of their joint adventure. Title to all of said lands was taken in the name of the defendant, who holds the title thereto, for the use and benefit of the joint adventure in accordance with the terms thereof, and as a trustee for plaintiff to the extent of plaintiff's interest therein. In each instance in which any timberlands were purchased, plaintiff handled the entire transaction together with all of its details, and directed that the title be taken in the name of the defendant for the purposes of such joint adventure and at all times until the breach of said agreement by defendant, as hereinafter alleged, defendant acknowledged and recognized that he held the title to such timberlands for the use and benefit of plaintiff and defendant, and as a trustee for plaintiff. That there are located and growing upon said timberlands approximately one billion, two hundred million feet of standing merchantable timber. That all of such timber purchased from states, counties or political subdivisions thereof, or by reason of tax sales, was purchased at less than Five Dollars (\$5.00) per acre. That the cost of such timber and timberlands, together with the taxes accruing thereon, and paid by defendant, does not exceed the sum of \$400,000. Such timber and timberlands herein described and referred to and purchased in accordance with the agreement of the parties herein described now have a fair market value of approximately \$6,000,000.

VI

That on or about July 2, 1946, defendant denied the existence of any joint adventure agreement with plaintiff, refused to recognize any such agreement, denied

plaintiff had any right, title, interest or claim to the timber or timberlands above described, wrongfully failed and refused to further carry out or perform such joint adventure agreement, wrongfully failed and refused to buy or sell any timber or timberlands, ceased to be associated with plaintiff in the carrying on of the business of the joint adventure agreement, has prevented plaintiff from further performing said joint adventure agreement and has appropriated the timber and timberlands above described to his own uses and purposes to the exclusion of plaintiff. Plaintiff has many times since demanded of defendant, that defendant perform and carry out said joint adventure agreement, recognize his right, title and interest in and to the above described timber and timberlands and has repeatedly demanded of defendant an accounting of the business transactions, advances and expenditures of the joint adventure agreement made by defendant, all of which demands have been wrongfully refused by defendant.

VII

That ever since on or about July 2, 1946, said timber and timberlands could have been advantageously sold at a large profit. A reasonable time has elapsed since the purchase of such timber and timberlands, and plaintiff has been ever since July 2, 1946, and now is able, ready and willing to sell said timberlands for and on behalf of plaintiff and defendant, at a large and substantial profit. In spite of the demands made upon defendant by plaintiffs, defendant has in all respects failed to carry out or perform any of the terms of such joint adventure and has been guilty of a breach thereof,

and a breach of trust, as aforesaid; all of such conduct on defendant's part is without any just cause or reason thereby depriving plaintiff of his rights under said joint adventure agreement to the timber and timberlands purchased pursuance thereto, and has deprived plaintiff of the expected profits and the profits that he is entitled to under such agreement and because of his labors, efforts, and expenditures in connection with the performance thereof.

VIII

Plaintiff has done and performed all things by him to be performed and done under the terms of the joint adventure agreement by him and is now able, ready and willing to do and perform any other matters and things required of him under such agreement. All conditions precedent have been performed and have occurred.

WHEREFORE, plaintiff prays for a decree of this Court against the defendant as follows:

I

That the joint adventure of plaintiff and defendant be established and plaintiff's interest in the above-described premises, timber and timberlands be determined.

II

That the title to all of the above-described premises, timber and timberlands, whether standing in the name of the defendant herein, or otherwise, and that plaintiff's interest in, claim to, or equitable title be determined and ascertained, liquidated and sold pursuant to the order of the Court, or it be divided in kind.

III

That a full and complete accounting be had between the parties hereto.

IV

That in the event of the liquidation or sale of the premises, timber and timberlands hereinbefore described, that one-half of the fair cash market value thereof, which was acquired by the plaintiff and defendant through tax or tax title proceedings and twenty per cent (20%) of the fair cash market value of lands acquired from private parties, after deducting any and all sums properly due to the defendant herein, be ordered and decreed paid to plaintiff.

V

That the plaintiff herein have such other relief as may be just, equitable, and meet in the premises.

/s/ C. E. H. Maloy

/s/ William W. Speer

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY
OF DEL NORTE

		FILED
		JUL 15 1949
SAMUEL J. WILSON,	)	EMMA COOPER
Plaintiff,	)	County Clerk
vs.	)	By.....EC.....
	)	Deputy
SAMUEL A. AGNEW,)	
Defendant.	)	No. 4060

SAMUEL A. AGNEW,	)	ANSWER TO
Defendant	)	AMENDED
and Cross-Plaintiff,	)	COMPLAINT
	)	AND
vs.	)	CROSS-COMPLAINT
)	
SAMUEL J. WILSON,)	
Plaintiff)	
and Cross-Defendant.)	

Now comes the above named Defendant, Samuel A. Agnew, and for cause of answer to said Amended Complaint, denies, admits and alleges as follows, to wit:

I.

Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations in Paragraph I of said Amended Complaint and denies upon information and belief each and all of the allegations as set forth in Paragraph I of said Amended Complaint.

II.

Admits that for a number of years prior to the time alleged in said Amended Complaint that the Defendant

operated mills for the manufacturing of lumber and dealt in timberlands; admits that at the time of the purported agreement hereinafter alleged (in said Amended Complaint) and for a considerable period of time prior thereto, Defendant wanted to acquire interest in timberlands in the States of California and Oregon, but denies that he wanted to acquire them for the resale thereof at a profit, and in this connection alleges that any timber or timberlands that Defendant acquired in the State of California or the State of Oregon were for the purpose of manufacturing the same into lumber and timber products, and that he never wanted to or acquired any timber or timberlands in California or Oregon for the purpose of reselling the same for a profit.

III.

Denies each and all of the allegations of Paragraph III of said Amended Complaint.

IV.

Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations in Paragraph IV of said Amended Complaint contained, and basing his denial upon information and belief, denies each and all of the allegations in Paragraph IV of said Amended Complaint.

V.

Answering Paragraph V of said Amended Complaint, Defendant denies each and every allegation therein contained, save and except that he admits that he advanced moneys to Plaintiff for the purchase of said timberlands and that title to all of said lands described in said

Amended Complaint was taken in the name of the Defendant and that he holds the title thereto.

VI.

Answering Paragraph VI of said Amended Complaint, Defendant denies each and every allegation therein contained, save and except that he admits that he has refused and still refuses to recognize any right, title or interest of Plaintiff in and to any of the lands mentioned and described in the Amended Complaint growing out of the alleged contract between Plaintiff and Defendant or otherwise or at all, and alleges that no such contract was ever entered into between Plaintiff and Defendant.

VII.

Answering Paragraph VII of said Amended Complaint, Defendant has not sufficient knowledge or information to form a belief as to whether said timber and/or timberlands or any portion thereof could have been sold at a profit or at all and denies each and every other allegation contained therein, save and except that he admits that he has refused and still refuses to carry out the alleged agreement between Plaintiff and Defendant and that no such agreement was ever made and entered into between the parties.

VIII.

Answering Paragraph VIII of said Amended Complaint, Defendant denies each and every allegation therein contained and the whole thereof. (sic)

AND FOR A FURTHER, SEPARATE AND SECOND CAUSE OF DEFENSE to said Amended Complaint, the Defendant alleges:

I.

That on the 2nd day of July, 1946, and at all times thereafter, the Plaintiff had full and actual knowledge of each and every one of the facts set forth in the said Amended Complaint herein.

II.

That this action was not commenced within two years from the date the 2nd day of July, 1946, the time when Plaintiff had full and actual knowledge of said facts as aforesaid and is barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

AND FOR A FURTHER, SEPARATE AND THIRD DEFENSE to said Amended Complaint, the Defendant alleges:

I.

That the purported joint adventure agreement mentioned in said Amended Complaint in this action and by which this Defendant is sought to be charged, was and is by its terms, not to be performed within one year from the making thereof; that said purported joint adventure agreement was never in any writing subscribed by the Defendant, or his agent, and that there is not now, nor was there ever any note or memorandum thereof subscribed by Defendant or by his agent, and is barred by the provisions of subdivision 1, 4 and 5 of Section 1973 of the Code of Civil Procedure of the State of California.

AND FOR A FURTHER, SEPARATE AND FOURTH CAUSE OF DEFENSE to said Amended Complaint, the Defendant alleges:

I.

That the Plaintiff ought not to be admitted or allowed to allege that he is the owner or has any right, or title or claim whatever to any of the timber or timberlands described in said Amended Complaint for the reasons hereinafter alleged. That on or about the spring or summer of 1943, Defendant and Plaintiff entered into an oral agreement whereby Plaintiff would sell Defendant and Defendant would purchase from Plaintiff, timber and timberlands in Del Norte, Trinity and Humboldt Counties in California and Curry County, Oregon, and it was further agreed that when and at such times as Plaintiff had timber and/or timberlands for sale held in private ownership, he would advise Defendant of that fact and submit a description of the timber and timberlands to Defendant and the price which Defendant was to pay Plaintiff therefor, and Defendant agreed that he would investigate the lands as to location, accessibility, the kind, quality and quantity of the timber located thereon and if the location of the lands, the kind, quality and quantity of the timber and the price for which Plaintiff would sell such timber and timberlands were satisfactory to Defendant, Defendant would advance Plaintiff the purchase price thereof.

That in pursuance and in accordance with said oral agreement, Defendant advanced and paid to Plaintiff for the purchase of said timberlands, the sum of \$350,-196.72 or thereabouts and that of said sum Plaintiff wrongfully, knowingly and with intent to defraud and without the consent or knowledge of Defendant, used the sum of more than \$30,500.00 for the purchase of

timber for his own use and benefit and has wrongfully, fraudulently and with intent to defraud and deceive, had the title vested in himself and in his own name and which Plaintiff now holds title to and claims as his own. That said Plaintiff has further wrongfully, knowingly and with intent to defraud and without the knowledge or consent of Defendant, diverted to his own use and benefit the sum of \$154,675.23 which Defendant advanced to him for the purchase of timberlands and which moneys Plaintiff has refused and now refuses to account to Defendant for.

CROSS - COMPLAINT

That for a cross-complaint, the Defendant alleges:

I.

That on or about the spring or summer of 1943, Defendant and Plaintiff entered into an oral agreement whereby Plaintiff would sell Defendant and Defendant would purchase from Plaintiff, timber and timberlands in Del Norte, Trinity and Humboldt Counties in California and Curry County, Oregon, and it was further agreed that when at such times as Plaintiff had timber and/or timberlands for sale held in private ownership, he would advise Defendant of that fact and submit a description of the timber and timberlands to Defendant and the price which Defendant was to pay Plaintiff therefor, and Defendant agreed that he would investigate the lands as to location, accessibility, the kind, quality and quantity of the timber located thereon and if the location of the lands, the kind, quality and quantity of the timber and the price for which Plaintiff would

sell such timber and timberlands were satisfactory to Defendant, Defendant would advance Plaintiff the purchase price thereof.

II.

That in pursuance and in accordance with said oral agreement, Plaintiff and cross-defendant offered to Defendant and Cross-Plaintiff for purchase of the following described lands situated in the County of Del Norte, State of California,

Parcel One

$N\frac{1}{2}$ of $NE\frac{1}{4}$; $SW\frac{1}{4}$ of $NE\frac{1}{4}$; $SE\frac{1}{4}$ of $NW\frac{1}{4}$ Section 13; $S\frac{1}{2}$ of $NE\frac{1}{4}$; $NE\frac{1}{4}$ of $NE\frac{1}{4}$ Section 19; $SE\frac{1}{4}$ of $SE\frac{1}{4}$, Section 18; $S\frac{1}{2}$ of $SW\frac{1}{4}$ Section 17; $N\frac{1}{2}$ of $NW\frac{1}{4}$; $E\frac{1}{2}$ of $SE\frac{1}{4}$ Section 20; $S\frac{1}{2}$ of $SW\frac{1}{4}$, Section 21; $E\frac{1}{2}$ of $SE\frac{1}{4}$; $E\frac{1}{2}$ of $NE\frac{1}{4}$, Section 26; $N\frac{1}{2}$ of $SE\frac{1}{4}$; $SW\frac{1}{4}$ of $SE\frac{1}{4}$; $NE\frac{1}{4}$ of $SW\frac{1}{4}$ Section 27, all in Township 15 N., R. 3 E., H. M., Del Norte County, California, according to the Government map and survey by the United States.

Parcel Two

$SE\frac{1}{4}$ Section 12; $E\frac{1}{2}$ of $SE\frac{1}{4}$ Section 17; $E\frac{1}{2}$ of $NE\frac{1}{4}$ Section 17; $SW\frac{1}{4}$ of $SE\frac{1}{4}$ Section 17; $NW\frac{1}{4}$ of $NE\frac{1}{4}$ Section 20; $S\frac{1}{2}$ of $NE\frac{1}{4}$ Section 20; $W\frac{1}{2}$ of $SE\frac{1}{4}$; $SW\frac{1}{4}$ of $NE\frac{1}{4}$; $SE\frac{1}{4}$ of $NW\frac{1}{4}$ Section 26; $NE\frac{1}{4}$ Section 27; $NE\frac{1}{4}$ of $NW\frac{1}{4}$ Section 27; $SE\frac{1}{4}$ of $SW\frac{1}{4}$; $S\frac{1}{2}$ of $SE\frac{1}{4}$ Section 22; $SE\frac{1}{4}$ Section 23, all in Township 15 N, R. 3 E., H.M.; in Del Norte County, California, according to the Government map and survey by the United States.

then owned by Gilbert Thorp Land Co., Inc., a New York corporation, and represented to Defendant and Cross-complainant that the price for said timberlands

would be \$20,800.00 and that thereupon Defendant and Cross-complainant investigated said timberlands and was satisfied with the quality, quantity and location of said timber and did on or about the 24th day of May, 1946, accept said offer and paid to said Plaintiff and Cross-defendant the sum of \$20,800.00 for the purchase price of said timber and for title insurance which said Plaintiff and Cross-Defendant represented that he would supply.

III.

That contrary to the terms of said agreement and for the purpose of defrauding and swindling Defendant and Cross-plaintiff, said Samuel J. Wilson, Plaintiff and Cross-defendant caused the title to said property above described to be placed in his own name, and took title thereto in his own name and has excluded Samuel A. Agnew, Defendant and Cross-complainant from any right, title or interest therein or the possession thereof and claims title and ownership of said premises.

IV.

That on or about the 15th day of Sept., 1947, Defendant and Cross-plaintiff for the first time discovered that title to the herein described real property and possession thereof had been taken by the said Samuel J. Wilson, Plaintiff and Cross-defendant and purchased with the funds provided him by Defendant and Cross-complainant as hereinafter alleged.

That prior to said date the said Samuel J. Wilson, Plaintiff and Cross-defendant concealed from Defendant and Cross-complainant the fact that he had taken title

to said premises in his own name and claimed title thereto contrary to the terms of said agreement.

V.

That by reason of said wrongful and unlawful actions of said Samuel J. Wilson, Plaintiff and Cross-Defendant, he has held and ever since the said date of said purchase, has held the title to said real property in his own name as trustee for said Samuel A. Agnew, Defendant and Cross-complainant.

AS A SECOND, FURTHER AND SEPARATE CAUSE OF CROSS-COMPLAINT, Defendant and Cross-complainant alleges:

I.

Hereby refers to as if repeated herein word for word and makes a part of this second, further and separate cause of cross-complaint, paragraph I of said first cross-complaint.

II.

That in pursuance and in accordance with the said oral agreement, Plaintiff and Cross-defendant offered to Defendant and Cross-plaintiff for purchase the following described timberlands situated in the County of Curry, State of Oregon, known as the Clutter tract and owned by various persons. That said timberlands are particularly described as follows, to wit:

NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 22; the W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 23; the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Section 26; the E $\frac{1}{2}$ of the NE $\frac{1}{4}$; the E $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 27, Township 36, S R 14, W. W. M., in the County of Curry, State of Oregon.

and represented to Defendant and Cross-complainant that said timberlands could be purchased and that there-upon Defendant and Cross-complainant investigated said timberlands and was satisfied with the quality, quantity and location of said timber and did prior to the 15th day of May, 1946, and paid to said Plaintiff and Cross-defendant the purchase price therefor and as represented by him.

III.

That contrary to the terms of said agreement and for the purpose of defrauding and swindling Defendant and Cross-plaintiff, said Samuel J. Wilson, Plaintiff and Cross-defendant caused the title to said property above described to be placed in his own name, and took title thereto in his own name and has excluded Samuel A. Agnew, Defendant and Cross-complainant from any right, title or interest therein or the possession thereof and claims title and ownership of said premises, and has sold a portion of the timber from said premises and obtained the proceeds therefor.

IV.

That on or about the 19th day of Sept., 1947, Defendant and Cross-plaintiff for the first time discovered that title to the herein described real property and possession thereof had been taken by the said Samuel J. Wilson, Plaintiff and Cross-defendant and purchased with the funds provided him by Defendant and Cross-complainant as hereinafter alleged.

That prior to said date the said Samuel J. Wilson, Plaintiff and Cross-defendant concealed from Defendant

and Cross-complainant the fact that he had taken title to said premises in his own name and claimed title thereto contrary to the terms of said agreement.

V.

That by reason of said wrongful and unlawful actions of said Samuel J. Wilson, Plaintiff and Cross-defendant, he has held and ever since the said date of said purchase, has held the title to said real property in his own name as trustee for said Samuel A. Agnew, Defendant and Cross-complainant.

AS A THIRD, FURTHER AND SEPARATE CAUSE OF CROSS-COMPLAINT, Defendant and Cross-complainant alleges:

I.

Hereby refers to Paragraph I of the first cause of action alleged herein, as if repeated herein word for word, and makes the same a part of this third, separate and further cause of action.

II.

That in pursuance and in accordance with said oral agreement, Defendant and Cross-plaintiff advanced and paid to Plaintiff and Cross-defendant, on or about and between the Spring of 1943 and the 1st day of January, 1947, for the purchase of timberlands which Plaintiff and Cross-defendant represented that he could obtain and convey to Defendant and Cross-plaintiff, the sum of approximately \$350,196.72 and that of said sum, Plaintiff and Cross-defendant has wrongfully, knowingly, intentionally and with intent to defraud and without

the knowledge or consent of Samuel A. Agnew, Defendant and Cross-plaintiff, diverted from said moneys so advanced and paid him, to his own use and benefit, the sum of \$165,021.49 which Defendant and Cross-plaintiff advanced to him for the purchase of timberlands and which moneys Plaintiff and Cross-defendant, Samuel J. Wilson, has refused and now refuses to account to Samuel A. Agnew, Defendant and Cross-plaintiff, for.

AS A FOURTH, SEPARATE AND FURTHER CAUSE OF CROSS-COMPLAINT, Defendant and Cross-complainant alleges:

I.

That on or about the 1st day of September, 1943, Defendant and Cross-plaintiff, Samuel A. Agnew, as a result and through certain tax foreclosure proceedings had and done in the County of Curry, State of Oregon, purchased and paid for certain real estate sold at public auction by the authorities of Curry County, State of Oregon, and a part of the lands which he sold and acquired is described as follows, to wit:

Section 36, Township 37 S. Range 14 W. W. M. Curry County, State of Oregon.

That Defendant and Cross-plaintiff at the special instance and request of Plaintiff and Cross-defendant, Samuel J. Wilson, permitted and allowed said Plaintiff and Cross-defendant, Samuel J. Wilson, to bid in all of the said property at said tax foreclosure sale for Defendant and Cross-plaintiff, Samuel A. Agnew, and thereafter and wholly unknown to Defendant and Cross-plaintiff, Samuel A. Agnew, the said Plaintiff and Cross-

defendant, Samuel J. Wilson, wrongfully, unlawfully and surreptitiously and wholly unknown to said Defendant and Cross-plaintiff, Samuel A. Agnew, obtained from the County of Curry, State of Oregon, a deed for said lands above described herein. In said deed the said Plaintiff and Cross-defendant, Samuel J. Wilson, had himself named as trustee therein and thereafter the said Plaintiff and Cross-defendant, Samuel J. Wilson, and on the 11th day of September, 1943, conveyed by deed to the Evans Products Company, a corporation, all of the cedar timber standing, lying and being upon said lands and as the consideration for said deed, the said Evans Products Company, a corporation, conveyed to Defendant and Cross-plaintiff, Samuel A. Agnew, by deed, all of the fir timber lying and being upon the following described lands, to wit:

Said lands in Section 2, Township 38, N. Range 14 W. W. M; also Section 35, Township 37, N. Range 14 W. W. M; also Section 34, Township 37, N, Range 14 W. W. M., Curry County, Oregon.

and in addition thereto, the said Evans Products Company, a corporation, paid to the said Plaintiff and Cross-defendant, Samuel J. Wilson, the sum of \$6,000.00 in cash.

II.

That Plaintiff and Cross-defendant, Samuel J. Wilson, at all times represented to Defendant and Cross-plaintiff, Samuel A. Agnew, that the exchange of the cedar timber upon the lands mentioned and described, was made for the fir timber upon the lands last mentioned and described and that there was no further con-

sideration passing from the Evans Products Company, a corporation, for such transfer; and the said Plaintiff and Cross-defendant, Samuel J. Wilson, appropriated and converted the said sum of \$6,000.00 to his own use and for his own purposes and wholly failed to disclose to Defendant and Cross-plaintiff, Samuel A. Agnew, that he had received as part of the consideration for such transaction the sum of \$6,000.00 paid by the Evans Products Company, a corporation.

III.

That all the cedar timber upon the land conveyed to Evans Products Company, a corporation, and hereinabove described, was owned by Defendant and Cross-plaintiff, Samuel A. Agnew, and the said Plaintiff and Cross-defendant, Samuel J. Wilson, had no right, title, interest or equity therein.

IV.

That Defendant and Cross-plaintiff, Samuel A. Agnew, did not learn and had no knowledge of the wrongful and unlawful actions of the said Plaintiff and Cross-defendant, Samuel J. Wilson, as hereinabove in this cause of action set forth, until on or about the 1st day of September, 1947.

WHEREFORE, Defendant and Cross-plaintiff, Samuel A. Agnew, prays judgment as follows:

a. That Plaintiff's complaint be dismissed with prejudice and that he take nothing thereby and that Defendant have his costs.

As to the first cross-complaint, Defendant prays judgment as follows:

A. That this Court find that with respect to the lands described in the first cross-complaint, that a trust exists as a result of which said Plaintiff and Cross-defendant, Samuel J. Wilson, holds title to said lands in his name as trustee for the use and benefit of Defendant and Cross-plaintiff, Samuel A. Agnew. That said Plaintiff and Cross-defendant, Samuel J. Wilson, be required to transfer the said title to said lands to Defendant and Cross-plaintiff, Samuel A. Agnew, and terminate the trust. That the title to said lands be found to be in Defendant and Cross-plaintiff, Samuel A. Agnew, and that Plaintiff and Cross-defendant, Samuel J. Wilson, be required by Decree of this Court to transfer the said title thereto to Defendant and Cross-plaintiff, Samuel A. Agnew. And for his costs of suit herein.

As to the second cross-complaint, Defendant prays judgment as follows:

A. That this Court find that with respect to the lands described in the second cross-complaint, that a trust exists as a result of which said Plaintiff and Cross-defendant, Samuel J. Wilson, holds title to said lands in his name as trustee for the use and benefit of Defendant and Cross-plaintiff, Samuel A. Agnew. That said Plaintiff and Cross-defendant, Samuel J. Wilson, be required to transfer the said title to said lands to Defendant and Cross-plaintiff, Samuel A. Agnew, and terminate the trust. That the title to said lands be found to be in Defendant and Cross-plaintiff, Samuel A. Agnew, and that Plaintiff and Cross-defendant, Samuel J. Wilson, be required by Decree of this Court to transfer the said

title thereto to Defendant and Cross-plaintiff, Samuel A. Agnew. And for his costs of suit herein.

As to the third cross-complaint, Defendant and Cross-plaintiff, Samuel A. Agnew, prays judgment as follows:

A. That Defendant and Cross-plaintiff, Samuel A. Agnew, have judgment against the said Plaintiff and Cross-defendant, Samuel J. Wilson, for the sum of \$165,021.49, and his costs of suit herein, and for an accounting of all moneys advanced and paid to Plaintiff and cross-defendant.

As to the fourth cross-complaint, Defendant and Cross-plaintiff, Samuel A. Agnew, prays judgment as follows:

A. That Defendant and Cross-plaintiff, Samuel A. Agnew, have judgment against the said Plaintiff and Cross-defendant, Samuel J. Wilson, for the sum of \$6,000.00 together with interest thereon and costs and disbursements of this action.

And for such other and further relief as to the Court seems meet and proper in the premises.

/s/ Irwin T. Quinn
Attorney for Defendant and
Cross-Plaintiff.

No. 15120

In the United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

THE UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), Executor of the Estate of
SAM J. WILSON, Deceased, and
JESSIE WILSON,
Appellees.

On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLEES

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FILED

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**In the United States
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On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLEES

PRELIMINARY STATEMENT

This is an appeal by the government from a judgment of the United States District Court for the District of Oregon in an income tax refund action. The trial court determined that the sum of \$437,783.53 in tax and interest had been improperly exacted from appellees and that it should be refunded to them.

After hearing the testimony, reviewing the numerous

exhibits and considering the authorities cited by the parties, the trial court determined (Tr. 37) that in January, 1943, (Tr. 191, 202), Samuel J. Wilson entered into an oral agreement of joint venture with one Samuel A. Agnew, by the terms of which they mutually agreed that Wilson would search for and examine various timberlands, locate the same and determine their suitability for purchase for later resale at a profit. It was mutually agreed that Agnew would furnish the necessary funds for the purchase of such timberlands as were selected by Wilson. It was further understood and agreed between them that all of said timberlands were to be sold within a reasonable time and that any profit resulting therefrom on timberlands acquired from any state, county or political subdivision of any state at a tax sale were to be divided equally between Wilson and Agnew, and that the profits derived from the sale of timberlands acquired from private owners were to be divided on the basis of 80 per cent thereof to Agnew and 20 per cent to Wilson. The agreement of joint venture was carried out until June of 1946. (Tr. 38).

In July, 1946, Agnew refused to recognize the interest of Wilson and the existence of the joint venture agreement. In July, 1948, Wilson instituted a suit against Agnew in Del Norte County, California, praying that the joint venture be established and that his interest in the timberlands be determined. (Tr. 39). After one day of trial, Wilson's claim of joint venture was compromised and settled by the transfer

to Wilson of certain timberlands (Tr. 39). The agreement was thereafter carried out in the year 1949 and in Wilson's income tax return for that year he duly reported the transaction as the nontaxable dissolution of a joint venture (Tr. 40). Wilson died on October 10, 1950.

The Commissioner of Internal Revenue determined a large deficiency in Wilson's income tax for the year 1949 upon the ground that the timberlands were not received by Wilson as the result of a dissolution of a joint venture but that the value of the timberlands constituted compensation for personal services performed by Wilson (Tr. 40). The executor of Wilson's estate paid the deficiency, plus interest, and when the refund claim was disallowed, this action was instituted.

APPELLEES' CONTENTIONS

Appellees' primary contention in this case is that no immediate tax was incurred by Sam J. Wilson in 1949 when the timberlands were conveyed to him in settlement of his litigation with Samuel A. Agnew. This is based upon what we believe to be a logical application to the facts of the following well recognized principles of law:

(1) That the taxable or nontaxable nature of the proceeds of litigation, whether as a result of a judgment or a compromise settlement, is determined by the nature of the basic claim of the party receiving such property; and

(2) That Wilson's basic claim in the Del Norte County proceedings was for a determination that a joint venture existed between him and Agnew and for a liquidation of its assets or a distribution thereof in kind; and

(3) That if a partnership or joint venture distributes its assets in kind, the partner or joint adventurer realizes no taxable gain or loss until he disposes of the property received in such liquidation; and

(4) That the conveyance of the timberlands to Wilson could not constitute a distribution of "profits" of the joint venture, as contended by the defendant in the trial court, because there were no profits to be distributed; and

(5) That the tax liability was postponed until such time as there was a sale or other disposition of the timberlands by the former joint adventurers.

ARGUMENT

The trial court found as a fact that Wilson and Agnew had entered into an oral agreement of joint venture (Tr. 37), just as Wilson had contended in the Del Norte County litigation (Tr. 38-39.) Appellees, however, were not trying to prove the existence of a joint venture, but were attempting only to show the nature of Wilson's suit against Agnew in order to establish the nontaxable character of the property received by Wilson in the settlement thereof. Although we

believe that the record shows (despite the fact that death prevented Wilson from so testifying) that a joint venture did in fact exist between Wilson and Agnew, we do not think that it was even necessary for the trial court to find in favor of the validity of Wilson's claim of joint venture because, as the Tax Court said in *Tygart Valley Glass Co. v. Commissioner*, 16 T. C. 941:

"Though both parties have argued at some length as to the validity of each claim, we consider it unnecessary to decide upon such validity, as to either, for our question is not their validity, but the nature, for tax purposes, of an amount received in settlement, which rests not upon the validity but upon the nature of the matter settled."

There appears to be no split of authority on the proposition that the taxable or nontaxable character of property received in the settlement of litigation is to be determined by the allegations in the pleadings of the person receiving the property. *Lyeth v. Hoey, Collector*, 305 U. S. 188, 59 S. Ct. 155; *Helvering, Comm'r. v. Safe Deposit & Trust Co. of Baltimore*, 316 U. S. 56, 62 S. Ct. 925.

A great many decisions of the federal courts recognize this principle: *Raytheon Production Corp. v. Comm'r.* (CCA1) 144 F. 2d 110; *Jones v. Corbyn* (CCA10) 186 F. 2d 450; *Mathey v. Comm'r.* (CCA1) 177 F. 2d 259; *Durkee v. Comm'r.* (CCA6) 162 F. 2d 184. As the Court stated in *Farmers & Merchants Bank v. Comm'r.* (CCA6) 59 F. 2d 912:

“The fund involved must be considered in the light of the claim from which it was realized and which is reflected in the petition filed.”

The Tax Court of the United States has also followed this rule without exception: *Megargel v. Comm'r.*, 3 T. C. 238; *Tygart Valley Glass Co. v. Comm'r.*, *supra*; and *Albert J. Goldsmith*, 22 T. C. 1137.

We have found no cases which dispute this general proposition that the character or nature of the proceeds received in the settlement of litigation is to be determined by the nature of the claim which was thereby settled. There can be no serious doubt that in the Del Norte County litigation (Appellees' Exhibits 1, 2 and 3) Wilson was seeking to establish his alleged joint venture with Agnew and to obtain a dissolution thereof or a partition of the properties acquired as the result of his efforts since the early part of the year 1943.

The prayer of Wilson in the principal case (Appellees' Exhibit 2) was “That the joint adventure of plaintiff and defendant be established and plaintiff's interest in the above described premises, timber and timberlands be determined”, and that Wilson's interest in the timberlands be either liquidated and sold or be divided in kind. An examination of the pleadings in Del Norte County case No. 4060 (Appellees' Exhibit 2) shows that prior to the date set for trial Agnew

filed a petition therein to limit the issue at the trial "to the question of whether or not a joint adventure was ever entered into between the parties hereto". The record of the first day's proceedings in the consolidated trial of these cases (Appellees' Exhibit 4) shows that the joint venture issue was the sole issue for determination by the Court at that time.

We do not believe that the Commissioner of Internal Revenue may re-examine the merits of the respective arguments of Wilson and Agnew in the Del Norte County proceedings, as these contentions were put at rest in the year 1949 when the parties entered into the settlement of their controversy and the timberlands were conveyed to Wilson in full satisfaction of his joint venture claim. It was not within the province of the Commissioner's representatives to determine arbitrarily that Wilson was wrong and Agnew was right in the Del Norte County litigation.

In the most recent case before The Tax Court on this question, the Commissioner of Internal Revenue conceded this general rule to be unquestioned:

"The respondent (The Commissioner of Internal Revenue) does not challenge the proposition that if the payment in question was actually made in consideration of the dismissal of petitioner's suit, the income tax consequences would be determined by the nature of the grounds of the action which was thereby settled." *Goldsmith v. Comm'r. supra.*

The Commissioner of Internal Revenue has acquiesced in the Goldsmith case and, therefore, we shall not labor this point further, as the government should be prepared to concede the validity of this general principle. Numerous authorities are collected in annotations in 173 A.L.R. 558 and 101 A.L.R. 1453, and the rule is reiterated in *Merten's Law of Federal Income Taxation*, Section 5.21.

We turn, then, to the well recognized principle that if a partnership, or joint venture, distributes its assets in kind, the partner, or joint adventurer, realizes no taxable gain or loss until he disposes of the property received in such liquidation. This principle finds support in the statutes and regulations and should require no further citation of authority.

The pertinent part of Section 113(a)(13) of the 1939 Internal Revenue Code was as follows:

"If the property was distributed in kind by a partnership to any partner, the basis of such property in the hands of the partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property."

Income tax Regulations 111, applicable to the years in question here, provided in part as follows:

"If the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received in liquidation." *Reg.* 29.113 (a)(13)-2.

The proper treatment of proceeds from the dissolution of such partnership or joint venture was amplified in an early ruling of the Treasury Department:

“Where a partnership distributes any part of its assets in kind and a partner, in lieu of an undivided fractional interest in the whole, receives a full interest in a certain part of the assets distributed, such a change in interest does not constitute a closed transaction reflecting gain or loss. When, however, the property thus received by a partner is sold, any gain derived or loss sustained at the time of such sale will be measured by the difference between the selling price and the cost of the property to the partnership.” *L. O. 816, 1 CB 168*

We believe that counsel for the government will agree that Section 731 of the 1954 Internal Revenue Code, relating to the extent of recognition of gain or loss on distribution of partnership assets, did not effect a substantive change in the law but merely codified the regulations and court decisions under the 1939 Code. Section 731 (a) (1) of the 1954 Code now provides:

“(a) Partners.—In the case of a distribution by a partnership to a partner—(1) gain shall not be recognized to such partner except to the extent that any money distributed exceeds the adjusted basis of such partner’s interest in the partnership immediately before the distribution.”

The stipulation for settlement of the Wilson-Agnew litigation (Appellees’ Exhibit 5) provided, in effect, that, in

addition to the timber to be conveyed to Wilson, he was to retain the unexpended moneys which he had received from Agnew. Wilson's income tax return for the year 1949, (Appellant's Exhibit C), reported that he had paid in \$36,180.46 to the joint venture but had cash withdrawals of \$54,700.00, leaving an excess of cash received over cash paid into the joint venture of \$18,519.54. The effect of the retention of these moneys by Wilson was the same as a distribution of cash to him in dissolution of the joint venture. We submit that the dissolution of the joint venture was properly reported in Wilson's 1949 income tax return.

ANSWER TO APPELLANT'S ARGUMENTS

From the outset, the position of the Commissioner of Internal Revenue in this case has been as elusive as a wet bar of soap. The deficiency notice which initially prompted this litigation (Tr. 231, at 234) was based upon the contention by the Commissioner that the property was received by Wilson as compensation for personal services. In the trial court, however, that patently untenable basis was cast aside in favor of the alternative contention that the properties received by Wilson constituted his share of the profits of the joint venture. We then pointed out that there were no sales of any of the timberlands (Tr. 24) and, hence, no possible profits, and the trial court found as a fact that "The conveyance of

the timberlands to Wilson did not constitute a distribution of profits or anticipated profits of the joint venture" (Tr. 41). The government now pushes those rejected arguments in the background and argues, for the first time, that the property received by Wilson constituted "damages for loss of profits resulting from Agnew's alleged breach of the alleged oral joint venture agreement." (Page 22, Appellant's Brief). The pretrial order entered in the trial court shows that no such contention was made there (Tr. 26-7), and the government did not raise that issue below (Tr. 28). It is doubtful whether this contention is properly before this Court (*Cf. U. S. v. Carruthers*, CCA 9, 1955, 219 F. 2d 21, at 26; Rule 16, Federal Rules of Civil Procedure) but, in any event, we respectfully submit that this belated argument has no more merit than the earlier contentions of the Commissioner.

Before considering the general authorities cited in appellant's brief, we should note that the Commissioner of Internal Revenue in his regulations issued for the years in question here stated as follows:

"The Internal Revenue Code provides its own concept of a partnership. Under the term 'partnership' it includes not only a partnership as known at common law but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or

a corporation. The following examples will illustrate some phases of these distinctions:

“(1) If A and B buy some acreage for the purpose of subdivision, they are joint adventurers, and the joint venture is classified by the Code as a partnership.

* * * * * “*Regulations* 111, *Sec.* 29.3797-4.

CASES CITED BY APPELLANT

A. The appellant first argues that “The court below erred in concluding that a joint venture, rather than an employment relationship, existed between Wilson and Agnew” (p. 13, Appellant’s Brief). Although the deficiency was asserted upon the ground that an employer-employee relationship existed between Agnew and Wilson, we believe that the government has, in fact, abandoned this position in favor of its current “damages for loss of anticipated profits” theory. This is understandable because even Agnew denied the existence of an employment relationship (Tr. 199, 200) and Agnew never claimed a deduction on his own income tax return for compensation paid to Wilson. He considered the settlement of the litigation as a division of the timber. (Tr. 219)

Appellant cites a number of cases to support its contention that “It is the general rule that among other essentials, there must be a sharing of losses as well as profits and a joint right of control.” (p. 13, Appellant’s Brief) Appellant cites three

early Oregon cases for the proposition that "in Oregon it is held that there must be a sharing of losses and that sharing of profits is not enough." (p. 15, Appellant's Brief) To the contrary, a more recent decision of the Supreme Court of the State of Oregon stated:

"It is probably the law that an agreement, express or implied, to share losses is not essential to a joint adventure, especially in cases where one party furnishes money and other services." *Devereaux v. Cockerline*, 179 Or. 229 at 242, 170 P. 2d 727.

Appellant also cites the decision of the Washington Supreme Court, in *Gottlieb Bros. v. Culbertson's*, 152 Wash. 205, 209; 277 P. 447, for the proposition that "there must be a sharing of losses as well as profits". Despite this analysis of the Washington law by appellant, we turn to the opinion of this court in *Eagle Star Insurance Co. v. Bean* (CCA9, 1943) 134 F.2d 755, at 757, which states:

"The elements of a joint enterprise, under the law of Washington, are stated in *Carboneau v. Peterson*, 1 Wash. 2d 347, 374, 95 P. 2d 1043, 1054, after a review of many of the Washington cases as '(1) a contract, (2) a common purpose (3) a community of interest, (4) equal right to a voice, accompanied by an equal right of control'. In view of the careful consideration given by the Supreme Court of Washington to their prior cases, we believe it is no longer the law of Washington that there is no joint adventure unless the parties

agree, expressly or impliedly, to share the losses.” (Citing many cases, including the *Gottlieb* case cited by appellant)

The California courts have also acknowledged recently that an agreement to share in the losses may be implied in any agreement of joint venture. *Fitzgerald v. Provines*, 102 Cal. App. 2d 529; 227 P. 2d 860, at 865.

Even though there is no requirement for a sharing of losses, as contended by appellant, we believe that the record shows that Wilson would have sustained substantial losses if the timber lands could not have been sold for a profit. Agnew stated repeatedly that he had paid Wilson nothing for his services in locating the desirable timber lands and arranging for their purchase. (Tr. 221). The recent comment of the Michigan court in *Summers v. Hoffman*, 341 Mich-686; 69 NW2d 198; 48 ALR2d 1033, seems pertinent in considering appellant’s argument in the instant case:

“With this contention we cannot agree. ‘Loss’ does not necessarily mean actual ‘monetary loss’. If the land was eventually sold at a loss the result would be that plaintiff’s expenditure of time would have been for nought as would defendant’s monetary investment. If the title litigation had been decided adversely then plaintiff would have lost large out-of-pocket expenses and the value of the time which he had theretofore spent on the project which, while not quite as concrete or measurable as defendants’ cash investment, is nevertheless a loss. It cannot be said that the plaintiff did not share any risk of loss . . . ”

With reference to the requirement of joint control, we respectfully refer the court to the allegations in paragraph III of the amended complaint of Wilson in Del Norte County case No. 4060 (Appellees' Exhibit 2). Both Wilson and Agnew had joint control of the disposition of the timberlands, even though the legal title thereto was in the name of Agnew. As this court pointed out in *Eagle Star Insurance Co. v. Bean*, supra, the fact that one of the parties has entrusted actual control to the other does not negative the holding that there was a joint adventure.

Other cases on the question of what amounts to a joint venture are collected in an annotation in 138 ALR at 968.

In *Elliott v. Murphy Timber Co.*, 117 Or. 387; 244 Pac 91, the Oregon Supreme Court stated:

"A joint adventure is analogous to, but not identical with, a partnership. It has been defined as, 'An association of two or more persons to carry out a single business enterprise for profit' (*Fletcher v. Fletcher*, 206 Mich. 153), and is 'usually but not necessarily, limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years.'" 33 C.J., p. 842. 'This name seems to be applied to those special combinations of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation. All such persons are partners or quasi partners, rather than joint or common owners; * * with essentially the

rights and disabilities which pertain to the partnership relation, although less comprehensive or permanent in the scope intended.' ”

We submit that the finding of the trial court that a joint venture existed was not “clearly erroneous”. The basic inquiry in determining whether a partnership or a joint venture exists is the intention of the parties. *Commissioner of Internal Revenue v. Culbertson*, 337 U.S. 733, 69 S.Ct. 1210.

B. Lastly, appellant argues that “Even assuming that a joint venture existed, the court below erred in concluding that the settlement proceeds represented a property division rather than damages for loss of profits.” (p. 22, Appellant’s Brief).

It is noteworthy that the appellant here completely abandons its position in the trial court that the transfer of the timberlands to Wilson in settlement of the litigation constituted a distribution of profits. It is also noteworthy that the Del Norte County litigation was an equity suit and not a tort action for damages.

An increase in the value of assets over their cost does not constitute profits or taxable income. For example, if the A-B partnership acquires property for \$35,000 and, over a period of time, the property attains a fair market value of \$100,000, the partners do not realize any taxable income. If the partnership is dissolved and the property distributed in kind to the partners, there is no taxable gain to the partners or to the

partnership. Upon any subsequent sale or exchange of the property by the former partners, however, they must report the difference between their share of the partnership's basis of \$35,000 and the selling price.

Wilson's contention in Del Norte County case No. 4060 (Appellees' Exhibit 2, Tr. 15-16) are to the effect that, pursuant to the joint venture between them, "Wilson would search for and examine timberlands suitable for purchase, such lands acceptable would be purchased, Agnew providing the funds necessary therefor; that lands so purchased were to be sold within a reasonable time for profit; that the profits realized from such sales, after deducting all sums advanced by Agnew with interest thereon at 5% per annum, were to be divided equally on tax title lands acquired from governmental sources and the profits were to be divided 80% to Agnew and 20% to Wilson on lands acquired from private owners" (Par. IV of Admitted Facts, page 3, Pretrial Order, Tr. 16).

It is readily apparent that Agnew was to be reimbursed, plus interest, for his disbursements before any profits were divided in the agreed proportions. Had there been any profitable sales during the existence of the joint venture, the cases relied upon by the government, such as *Parr v. Scofield* (CCA5, 1950) 185 F. 2d 535, would seem to have some application. Cf. *Commissioner v. Estate of Goldberger* (CCA 3, 1954) 213 F. 2d 82. There were no such sales, however, and no profits. What Wilson was receiving during

the life of the joint venture was an agreed share in the unrealized appreciation in the value of the timber. Such increment in value, however, did not constitute taxable income to the joint venture nor to either Wilson or Agnew upon dissolution thereof.

In 1949 Wilson's basis in the timberlands received by him in the settlement of the litigation, for the determination of the amount of gain or loss upon any subsequent disposition thereof, was zero. If, as contended by Wilson, there was a joint venture between them and it was voluntarily dissolved by them in the year 1949, there would have been no taxable gain at that time to either Agnew or Wilson. The fact that Wilson received his distributive share as a result of the compromise of the litigation cannot make taxable that which would have been nontaxable if received as a result of a voluntary dissolution of the joint venture and the distribution of its assets to the parties. *Jones v. Corbyn*, supra.

CONCLUSION

We respectfully submit that the timber and timberlands received by Wilson in settlement of the litigation constituted the distribution of property in the nontaxable dissolution of a joint venture, and the fair market value thereof did not constitute compensation to Wilson for his personal services, as originally contended by the Commissioner of Internal

Revenue; there was no distribution of profits of the joint venture, as contended by the government in the trial court, for the simple reason that there were no profits; and, finally, that the property received by Wilson was not in lieu of damages for lost profits.

The trial court in its findings of fact (Tr. 41) found that the settlement agreement of November 14, 1949, effected the dissolution of the joint venture theretofore existing between Agnew and Wilson and that the conveyance of the timberlands to Wilson did not constitute a distribution of profits or anticipated profits of the joint venture. In view of the foregoing, we submit that these findings of fact by the trial court were not "clearly erroneous" within the purview of Rule 52(a) of the Federal Rules of Civil Procedure, and that the judgment of the trial court is correct and should be affirmed.

Respectfully submitted,

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No. 15121.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MATSUO YOSHIDA and CHISATO YOSHIDA,

Appellants,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

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FILED

JUL 30 1956

PAUL P. O'BRIEN, CLERK

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No. 15121.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MATSUO YOSHIDA and CHISATO YOSHIDA,

Appellants,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment entered in favor of Appellee on January 9, 1956 by the United States District Court for the Southern District of California, Central Division. [Tr. pp. 73, 74.]

Motion for New Trial was filed with said District Court on January 19, 1956; and, after argument, was denied on February 7, 1956. [Tr. pp. 75-80.]

Notice of Appeal was filed on March 6, 1956. [Tr. p. 81.]

Jurisdiction was vested in said District Court by reason of the fact that Appellants were at all times citizens of Japan, and Appellee was at all times a corporation, incorporated under the laws of the State of Massachusetts. [Tr. pp. 21, 59, 118, 162.]

The basis of jurisdiction of said District Court was diversity of citizenship. Diversity exists where a citizen of a foreign nation brings suit against a corporation, incorporated in a State other than that in which the District Court sits.

Constitution of the United States, Art. III, Sec. 2;
Lumbermen's Mutual Casualty Co. v. Elbert, 348
U. S. 48 (1954);

Uribe v. Hartford Accident & Indemnity Co., 3
Fed. Supp. 672 (Idaho, 1933);
28 U. S. C. A., Sec. 1232.

An appeal from final judgment of the District Court to the Court of Appeals is authorized by the provisions of 28 U. S. C. A., Sec. 1291.

Nature of the Action.

Appellants brought this action against Appellee to recover on an insurance policy issued by Appellee in favor of Sylvester M. Gonzales, hereinafter referred to as Gonzales. Prior to commencement of this action, Appellants recovered judgment for personal injuries against Gonzales in the Superior Court of Los Angeles County, California.

This action is against Gonzales' insurer. When judgment is entered against an insured in an action for personal injuries, the judgment creditor may sue the insurer on the policy to recover the amount of the judgment.

Cal. Ins. Code, Sec. 11580(b)(2).

Moreover, Appellee's insurance policy provided that any person who secures judgment against the insured shall be entitled to recover under the policy to the extent

of insurance afforded thereunder. Plaintiff's Exhibit 8. [Tr. p. 121.]

The liability of an insuror in favor of the policyholder's judgment creditor is for the full amount of the policy, plus interest and costs.

Pigg v. International Indemnity Co., 86 Cal. App. 671, 675, 261 Pac. 486 (1927).

Statement of the Case.

A. The Superior Court Action.

Appellants are husband and wife. On April 15, 1953, Appellant Chisato Yoshida suffered personal injuries as a result of the negligent operation of an automobile driven by Gonzales. An action was commenced and tried in the Superior Court of the State of California, in and for the County of Los Angeles. Judgment was entered against Gonzales, in favor of Appellant Chisato Yoshida in the amount of \$25,540.00, for general damages, for loss of earnings and for future medical expense; and, in favor of Appellant Matsuo Yoshida in the amount of \$4,632.45, for loss of services and for medical, surgical and ambulance expense incurred on behalf of his wife. In addition, costs in the amount of \$37.55 were taxed against Gonzales.

On June 19, 1954, the judgment against Gonzales became final. Plaintiff's Exhibits 1 and 2. [Tr. pp. 9, 119.]

No part of said judgment has been paid by Gonzales or by Appellee. [Tr. pp. 9, 163.]

At the date of the accident, Gonzales was insured under an automobile liability policy issued by Appellee. Appellee has denied liability under said insurance policy for any part of said judgment.

B. The Application for Insurance, the Investigation.

In early April, 1952, Gonzales went to the offices of Biebrach, Bruch and Moore, Inc., insurance brokers in San Jose, California to procure automobile liability insurance. [Tr. p. 182.]

At that time Gonzales told an employee of said firm that he desired automobile insurance to enable him to obtain a California operator's license and to purchase an automobile to use as transportation to and from work. [Tr. pp. 182-188.]

The broker gave Gonzales an application for insurance under the California Assigned Risk Plan. The California Assigned Risk Plan was established to provide automobile liability insurance for those persons who are in good faith entitled thereto but are unable to procure insurance by ordinary methods. All automobile liability insurance carriers engaged in business in California are required to participate in said Plan and each carrier is assigned its pro rata share of assigned risks.

Cal. Ins. Code, Sec. 11160, et seq.

Since Gonzales was unable to read, Mrs. Gonzales completed the California Assigned Risk Application on behalf of her husband. [Tr. pp. 181, 216-218.]

Question 13 of the application asked the purposes for which the automobile was to be used. Gonzales answered, "Transportation to and from work."

Question 27 of the application asked "Are you required to file evidence of financial responsibility?" Gonzales answered, "Yes."

Question 27(a) asked what form of certificate is required by the Motor Vehicle Department. Gonzales marked the space specifying the form as "Owner and Operator."

Questions 15 and 16 asked if Gonzales had a California auto registration and operator's license. Gonzales replied that he had neither.

The application stated that the applicant must answer all questions fully. Mrs. Gonzales did not fully complete the application on behalf of her husband. A number of questions were partially or totally unanswered. Plaintiff's Exhibit 3. [Tr. p. 119.]

On or about April 15, 1952, Gonzales' application for insurance was forwarded to Appellee from the California Automobile Assigned Risk Plan. [Tr. p. 3.]

On or about April 17, 1952, Appellee in the regular course of its business received a confidential report from Metropolitan Reporting Service, a service used by insurance companies, and which had been employed at the expense of Appellee to investigate Gonzales. [Tr. pp. 332, 373, 374.]

The confidential report stated that Gonzales' automobile was not seen but at the time of inspection was stated to be in good mechanical and operational condition, that it was used for Gonzales' own personal pleasure and needs and that when it was not in use it was garaged at home. Plaintiff's Exhibit 5. [Tr. p. 120.]

C. The Insurance Policy.

Although the application for insurance was not completed, Appellee issued an insurance policy on behalf of Gonzales.

The original policy issued by Appellee was not available at the trial. Both Gonzales and his wife stated that they delivered the original policy and other of their papers to Elmar Schmidt, an adjustor employed by Appellee. [Tr. pp. 206, 207, 271, 272.] Mr. Schmidt admitted receiving the other papers but denied obtaining the original policy.

[Tr. pp. 388-396.] None of the documents received by Mr. Schmidt from Gonzales were returned. [Tr. pp. 278, 397.]

James H. Merritt, underwriting manager of the Pacific Division of Appellee, testified that Appellee issued a non-owner automobile liability policy in accordance with the application submitted by Gonzales and that Appellee believed that Gonzales did not have an automobile at the time it issued its policy. [Tr. pp. 310-313.] Mr. Merritt testified that the policy issued by Appellee was the original of Plaintiff's Exhibits 8 and 9 and Defendant's Exhibit I. [Tr. pp. 121, 325.] See Exhibit B to Defendant's Answer to First Amended Complaint. [Tr. pp. 54-58.]

However, Appellee's quotation sheet, written prior to the issuance of the policy stated that Gonzales' automobile "Will be principally garaged in San Jose." Plaintiff's Exhibit 18. [Tr. pp. 329, 333.]

According to Mr. Merritt, the policy contained a special "non-owner endorsement" providing that Gonzales was not insured in the operation of any automobile owned by him. Mrs. Gonzales testified that the special "non-owner endorsement" was not attached to the original policy received by Gonzales. [Tr. pp. 259-260.] Mr. Merritt testified that Plaintiff's Exhibit 18 was an exact carbon copy of said special endorsement. [Tr. pp. 308, 328, 329.] The carbon copy of the special endorsement did not state the date on which it was to become effective although space was provided in which to insert the effective date.

Mr. Merritt further testified that the policy period was from May 3, 1952 to May 3, 1953 with liability limits

of \$5,000.00 for each person and \$10,000.00 for each accident and that Gonzales paid the premium that was charged him.

D. Certificate of Financial Responsibility.

Mr. Merritt testified that since Gonzales applied for insurance in order to obtain a California operator's license, it was necessary for Appellee to file a Certificate of Financial Responsibility with the California Department of Motor Vehicles before such license would be issued to Gonzales. [Tr. pp. 374-375.]

See:

Cal. Veh. Code, Sec. 415.

Accordingly, upon issuing the policy to Gonzales, Appellee filed a Certificate of Financial Responsibility with the Department of Motor Vehicles. [Tr. p. 4.]

The Certificate stated that Appellee's insurance policy covered "the operation of any motor vehicle *not registered* to the insured." Plaintiff's Exhibit 7. [Tr. p. 120.]

Mr. Merritt testified that Appellee customarily and usually files a Certificate of Financial Responsibility of the type requested in the application for insurance. However, although Gonzales requested a certificate as "*owner and operator*," Appellee did not file this type of certificate on behalf of Gonzales. [Tr. pp. 335-337, 374-375.]

Mr. Merritt also testified that he knew that it was possible for Gonzales to have owned an automobile and not have the automobile registered. [Tr. pp. 369-371.]

Subsequent to the accident involving Appellant Chisato Yoshida, Keith Thomas, Claims Supervisor of Appellee, advised Appellee that the language of Appellee's Certificate of Financial Responsibility would be much more

adequate if it read "*not owned by nor registered to the insured.*" [Tr. pp. 399-400.]

After said accident, the language of the Certificate of Financial Responsibility was changed to read in conformity with Mr. Thomas' suggestion. Plaintiff's Exhibit 19. [Tr. pp. 343-346, 399-400.]

E. The 1937 Chevrolet and Registration.

On September 21, 1952, Gonzales acquired a 1937 Chevrolet, the automobile involved in the accident with Appellant Chisato Yoshida. [Tr. p. 191.]

At that time, Gonzales signed a car order with the vendor, O. K. Morton, which stated that "title of ownership" did not pass to Gonzales until the final cash payment was made. Plaintiff's Exhibit 10. [Tr. p. 121.]

Gonzales has never fully paid for the automobile and at the time of the accident with Appellant Chisato Yoshida the final cash payment had not been made. [Tr. p. 192.]

The 1952 registration on said Chevrolet expired on December 31, 1952. The 1953 registration was not obtained until after the date of the accident involving Appellant Chisato Yoshida. At the date of the accident with Appellant Chisato Yoshida, the automobile was not registered to Gonzales. Plaintiff's Exhibit 17. [Tr. pp. 5, 143, 144, 160.]

F. Notice of Acquisition of 1937 Chevrolet.

Appellee's insurance policy provided for giving of notice of newly acquired automobiles within 30 days in order to be covered by Appellee's insurance. Gonzales did not notify Appellee of acquisition of the 1937 Chevrolet within said 30 day period. Plaintiff's Exhibit 8. [Tr. p. 121.]

However, on January 29, 1953, while driving said 1937 Chevrolet, Gonzales had an accident with one, Ephraim Lopez. [Tr. pp. 194, 195.]

On January 31, 1953, Gonzales filed an accident report with Appellee, and on or about March 23, 1953, Appellee received a letter from Olympic Insurance Company with reference to said Lopez accident. Both of said documents stated that Gonzales was the owner and operator of the automobile involved in the Lopez accident. Plaintiff's Exhibit 11. [Tr. pp. 4, 5, 122.]

G. Estoppel and Waiver of Appellee.

After receiving notice that Gonzales owned said 1937 Chevrolet, Appellee mailed a letter to him, which stated "Dear Policyholder: Thank you for reporting this accident which is receiving our careful attention. You may be sure that you will receive full protection according to your policy coverage," along with additional claim blanks to be used in case of further accidents. Plaintiff's Exhibit 12. [Tr. pp. 5, 17, 124, 265, 268.] Subsequently, Appellee settled the Lopez claim by paying certain monies on behalf of Gonzales. Plaintiff's Exhibit 11. [Tr. pp. 5, 122.]

During 1953, Appellee used a form of classification sheet for specifying insurance coverage of its policyholders. Such classification sheets were prepared after accidents involving Appellee's policyholders and were employed in handling claims filed against persons insured by Appellee. The classification sheet used in connection with the Lopez claim stated that Gonzales owned a 1937 Chevrolet which was garaged in California. It did not specify that a non-ownership endorsement was issued to Gonzales although space was provided to state whether a non-owner-

ship policy was involved. Plaintiff's Exhibit 11. [Tr. pp. 122, 346.]

The classification sheet used in connection with Appellant Chisato Yoshida's accident was identical to the Lopez classification sheet except that it stated that Gonzales owned a 1934 Chevrolet. Plaintiff's Exhibit 14. [Tr. pp. 125, 346, 353.]

A telegram from Appellee's San Francisco office to its Los Angeles office, dated April 24, 1953, regarding the insurance coverage afforded Gonzales referred to an automobile belonging to Gonzales "garaged at San Jose." Plaintiff's Exhibit 18. [Tr. p. 329.]

At no time after receiving notice that Gonzales owned the 1937 Chevrolet, did Appellee inform Gonzales that he was not covered by insurance while driving the 1937 Chevrolet. The first time that Gonzales was advised that there was a question of coverage was after his accident with Appellant Chisato Yoshida. [Tr. pp. 17, 199-205, 218-220.]

After the Lopez accident and until the accident with Appellant Chisato Yoshida, Gonzales continued to drive the 1937 Chevrolet. [Tr. pp. 200-201.]

Since the original insurance policy was not available to Appellants, the First Amended Complaint sets forth inconsistent facts regarding Appellee's insurance policy, in alternative causes of action and in accordance with F. R. C. P., Rule 8(e)(2).

Automobile Insurance Company v. Barnes-Manley,
168 F. 2d 381 (10th Cir., 1948);

Blazer v. Black, 196 F. 2d 139 (10th Cir., 1952).

All emphasis in this brief is added.

ARGUMENT.

I.

Appellee's Insurance Policy Covered Gonzales for Liability Arising Out of the Operation of the 1937 Chevrolet Involved in the Accident With Appellant Chisato Yoshida.

A. The 1937 Chevrolet Was Not an Owned Vehicle Within the Meaning of Appellee's Insurance Policy.

Coverage A of Section 1 of Appellee's insurance policy provided that Appellee shall pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by accident and arising out of the ownership, maintenance or use of the automobile." Plaintiff's Exhibit 8. [Tr. p. 121.]

The Trial Court found that Appellee issued on behalf of Gonzales a policy to which was attached an endorsement which provided that "the insurance does not apply (a) to any automobile owned by the named insured or a member of his household . . ." and that Gonzales "acquired the ownership" of said 1937 Chevrolet prior to the accident with Appellant Chisato Yoshida. [Tr. pp. 60, 61, 64.]

The latter finding is erroneous as a matter of law insofar as it construes Appellee's insurance policy most strongly in favor of Appellee.

On September 21, 1952, Gonzales signed a car order for purchase of the 1937 Chevrolet. The car order stated that title of ownership did not pass to Gonzales until the final cash payment was made. Plaintiff's Exhibit 10. [Tr. p. 121.] The evidence is undisputed that Gonzales has never paid for said automobile and that at the time of

the accident with Appellant Chisato Yoshida the final cash payment had not been made. [Tr. p. 192.]

Under California Civil Code, Section 1738, where a contract to sell specific goods exists, the property is transferred to the buyer at such time as the parties intend.

In the instant case, ownership remained in the vendor and Gonzales received nothing more than a conditional right to possession.

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. 2d 731, 745, 117 P. 2d 661 (1941);
Houghan v. Rowland, 33 Cal. App. 2d 11, 14, 90 P. 2d 860 (1939).

The word "owner" is defined in at least six different ways in the California Vehicle Code.

See:

Cal. Veh. Code, Secs. 66, 67, 176, 177, 383.5, 402, 716.

However, the term "owned" is not defined in Appellee's insurance policy.

Since parol evidence was not offered to aid construction of the policy, construction is a matter of law.

Continental Casualty Co. v. Phoenix Construction Co., 46 A. C. 429, 435, P. 2d (1956);
Western Coal & Mining Co. v. Jones, 27 Cal. 2d 819, 826-827, 167 P. 2d 719 (1946).

Whether Appellee's policy used the term "owned" in the common law sense or within the context of any of the cited Vehicle Code sections is left to conjecture and the "non-owner" endorsement logically could have more than one meaning.

Where the language of an insurance policy is susceptible of two constructions, the policy should be construed most strongly in favor of the insured.

Kershner v. United States of America, 215 F. 2d 737 (9th Cir., 1954);

Allstate Insurance Co. v. Erickson, 227 F. 2d 755 (9th Cir., 1955);

Continental Casualty Co. v. Phoenix Construction Co., 46 A. C. 429, P. 2d (1956);

Pleasant Valley Assn. v. Cal-Farms, Inc., 142 A. C. A. 136, 142, P. 2d (1956);

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. 2d 731, 747, 117 P. 2d 661 (1941);

Pendell v. Westland Life Ins. Co., 95 Cal. App. 2d 766, 769, 214 P. 2d 392 (1950).

An injured party suing on an insurance policy also is entitled to have the policy construed most strongly against the insurer.

Sly v. American Indemnity Co., 127 Cal. App. 202, 15 P. 2d 522 (1932).

Moreover, where coverage is to be limited by exceptions, the insurer must phrase the exceptions in clear and unmistakable language.

Pendell v. Westland Life Ins. Co., 95 Cal. App. 2d 766, 214 P. 2d 392 (1950).

In the *Pendell* case, *supra*, the court stated on page 770 as follows:

“Exceptions in a contract of insurance which purports to limit the risk assumed by the insurer in the general provisions thereof are to be construed most

strongly against the insurer and in favor of the insured and if susceptible of two meanings, the one most favorable to the insured is to be adopted.”

In *Continental Casualty Co. v. Phoenix Construction Co.*, *supra*, the court stated as follows on page 442:

“If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured, for the losses to which the insurance relates.”

Accordingly, since the non-owner endorsement could have two or more logical interpretations, the Court should construe the policy in favor of the assured and hold, as a matter of law, that the 1937 Chevrolet was not an “owned” automobile within the meaning of Appellee’s special endorsement, title having remained in the vendor. Thus, Gonzales was covered by Appellee’s insurance.

B. The Non-owner Endorsement Was Not Operative on the Date of the Accident With Appellant Chisato Yoshida.

Assuming, *arguendo*, that the 1937 Chevrolet was an owned automobile within the meaning of Appellee’s policy, the special non-owner endorsement was not operative on the date of the accident with Appellant Chisato Yoshida.

The non-owner endorsement had space provided in which to insert its “effective date.” No effective date was stated in the endorsement. Plaintiff’s Exhibit 18. [Tr. pp. 308, 328, 329.]

No explanation was offered at the trial as to the reasons why the non-owner endorsement did not state the date on which it was to become effective.

Accordingly, in accordance with the authorities cited above, such failure to state an effective date must be construed against Appellee. Thus, the non-owner endorsement was not operative on the date of the accident with Appellant Chisato Yoshida, and the 1937 Chevrolet was covered by Appellee's policy. The trial court's finding that non-owner policy was to be effective from May 3, 1952 [Tr. p. 60], is clearly at variance with the special endorsement.

C. Appellee Itself Has Construed Its Insurance Policy as Affording Coverage to Gonzales in the Operation of the 1937 Chevrolet.

At most, Appellee's policy is ambiguous with reference to the meaning of its non-owner endorsement and whether its undated endorsement was operative. Accordingly, under California law, Appellee's conduct may be examined to discover what Appellee understood the coverage to include. The construction given by Appellee should be enforced by the Court.

See cases cited in

12 Cal. Jur. 2d 341.

What did Appellee believe its coverage included? Appellee's quotation sheet, prepared prior to the issuance of the policy, referred to an automobile garaged in San Jose. Plaintiff's Exhibit 18. [Tr. pp. 329, 323.] Appellee's Certificate of Financial Responsibility stated that coverage included all automobiles not registered to Gonzales. Plaintiff's Exhibit 7. [Tr. p. 120.] Appellee received notice of Gonzales' interest in an automobile in its Confidential Report received from Metropolitan Reporting Service, Plaintiff's Exhibit 5 [Tr. p. 120], and subsequent to

the Lopez accident, from both Gonzales and the Olympic Insurance Company. Plaintiff's Exhibit 11. [Tr. pp. 4, 5, 122.]

Thereafter, Appellee advised Gonzales that he was receiving full protection according to his policy coverage, mailed Gonzales additional claim blanks to be used in case of further accidents, Plaintiff's Exhibit 12 [Tr. pp. 5, 17, 124, 265, 268], settled the Lopez claim asserted against Gonzales, Plaintiff's Exhibit 11 [Tr. pp. 5, 122], stated in its classification sheets that Gonzales owned a Chevrolet automobile and did not state that non-ownership coverage was applicable. Plaintiff's Exhibits 11 and 14. [Tr. pp. 122, 125, 346, 353.] Appellee advised its Los Angeles office that Gonzales was covered for an automobile garaged in San Jose, Plaintiff's Exhibit 18 [Tr. p. 329], and at no time prior to the accident with Appellant Chisato Yoshida advised Gonzales that there was any question of coverage. [Tr. pp. 17, 199-205, 218-220.]

Appellee's conduct unequivocally establishes that, until Appellee faced the risk of paying for the substantial injuries sustained by Appellant Chisato Yoshida, and even subsequent thereto, in the preparation of its classification sheet, Appellee acted as though Gonzales was covered in the operation of the 1937 Chevrolet. Since Appellee itself construed its policy as affording coverage to Gonzales, the Court should likewise interpret said policy.

II.

Appellee Is Estopped to Assert That Its Insurance Policy Did Not Cover Gonzales for Liability Arising Out of the Operation of the 1937 Chevrolet.

A. As a Matter of Law Appellee Cannot Assert That Its Insurance Policy Was Contrary to the Application Filed by Gonzales.

The California courts have been most liberal in establishing an estoppel when it is necessary to do justice.

Trades & General Insurance Co. v. Champ, 225 F. 2d 802 (9th Cir., 1955);

Truck Insurance Exchange v. Industrial Accident Commission, 36 Cal. 2d 646, 226 P. 2d 583 (1951).

In his application for insurance, Gonzales stated that he desired an automobile to be used for transportation to and from work and that he was required to file a Certificate of Financial Responsibility with the California Department of Motor Vehicles as "owner and operator." Plaintiff's Exhibit 3. [Tr. p. 119.]

Appellee's Pacific Coast Underwriting Manager testified that Appellee regularly files a Certificate of Financial Responsibility of the type requested in the application for insurance, in which certificate Appellee states the type of insurance issued. Although Gonzales requested that a Certificate be filed which specified coverage as owner and operator, Appellee did not issue this type of insurance policy to Gonzales and Appellee did not file a Certificate of the type requested by Gonzales in his application. [Tr. pp. 335-337, 374-375.]

See:

Cal. Veh. Code, Sec. 414.

At the bottom of the application, the following was stated: "Review this application to make certain all questions are answered in full in order to eliminate delay." Plaintiff's Exhibit 3. [Tr. p. 119.]

Appellee issued a policy in favor of Gonzales without requiring the application to be completed. Thus, Appellee is bound by the application. If the application was ambiguous in any respect, such ambiguity must be resolved against Appellee, and if the language of the application could be understood in more than one sense, construction must be against Appellee and in favor of the insured.

New York Life Insurance Co. v. Calhoun, 92 F. 2d 406 (8th Cir., 1938);

Bayley v. Employers Liability Assurance Corp., 125 Cal. 345, 58 Pac. 7 (1899);

Faris v. American National Assurance Co., 44 Cal. App. 48, 54, 55, 185 Pac. 1035 (1919).

Whether or not Gonzales owned an automobile at the time the application was filed is immaterial. Appellee should have either issued a policy which would have enabled it to file a Certificate of Financial Responsibility in conformity with Gonzales' request or notified him that the application was ambiguous and incomplete. Having failed to thus notify Gonzales, Appellee is estopped to assert that its coverage was other than requested in the application.

An insured has a right to rely on the presumption that the policy he received is in accordance with his application,

and his failure to read the policy will not relieve the insurer from the duty of so writing it.

Motor T Company v. Great American Indemnity Co., 6 Cal. 2d 439, 58 P. 2d 374 (1936);

Ames v. Employers Casualty Co., 16 Cal. App. 2d 255, 256, 60 P. 2d 347 (1936);

California Co. v. New Zealand Insurance Co., 23 Cal. App. 611, 138 Pac. 960 (1913).

Where an insurer inserts a clause in a policy contrary to the application such clause will not affect the rights of the insured or the rights of a member of the public which the insured was attempting to protect in good faith. The failure of the insured to discover such a clause inserted in the policy is not a defense to the insurer.

American Employers Assurance Co. v. Lindquist, 43 Fed. Supp. 610 (N. D. Cal., 1942);

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 313, 197 Pac. 99 (1921);

Raulet v. Northwestern Insurance Co., 157 Cal. 213, 107 Pac. 292 (1910).

In *Snyder v. Redding Motors*, 131 Cal. App. 2d 416, 280 P. 2d 811 (1955), plaintiffs applied and paid for property damage insurance. The insurance company failed to take action on the application, failed to issue a policy, failed to return the application, and failed to refund the premium. The Court of Appeals in affirming the Trial Court's holding that there was an implied acceptance of the policy, stated on pages 422 and 423 as follows:

" . . . The premium had been paid by respondents and not returned to them. Being thus misled they operated their vehicle on the highways believing

that they were protected in the event that damage occurred which would be covered by the policy.

“ . . . When an agent accepts an application and the premium therefor the average automobile purchaser feels justified in driving his newly acquired automobile in the belief that he is insured in accordance with the terms of the application.”

Accordingly, Appellee is estopped as a matter of law, to assert that its policy was contrary to Gonzales' application, and any ambiguities in the application should be resolved against Gonzales. The Court should hold that Appellee should have issued such insurance to Gonzales to have enabled it to have filed a Certificate of Financial Responsibility as “owner and operator.” Under such insurance Gonzales would have been covered in the operation of said 1937 Chevrolet, and Appellee would be liable to Appellants.

B. As a Matter of Law Appellee Is Estopped to Assert That the Coverage of Its Insurance Policy Was Other Than Set Forth in the Certificate of Financial Responsibility Filed With the California Department of Motor Vehicles.

Condition 5 of Appellee's insurance policy provides that the policy “shall comply with the provisions of the Motor Vehicle Financial Responsibility Law of any state or province which shall be applicable . . .” Plaintiff's Exhibit 8. [Tr. p. 121.]

California Vehicle Code, Section 414, provides that an insurance carrier may give evidence of financial responsibility to the State of California by filing a written certificate that it has issued for the benefit of its insured a Motor Vehicle liability policy as defined in Vehicle Code, Section 415.

Said Vehicle Code provisions are part of the California Financial Responsibility Law and are to be read in interpreting Appellee's policy.

Continental Casualty Co. v. Phoenix Construction Co., 46 A. C. 429, P. 2d (1956).

In the instant case, Appellee filed a Certificate of Financial Responsibility with the Department of Motor Vehicles stating that its insurance covered Gonzales in "the operation of any motor vehicle *not registered* to the insured." Plaintiff's Exhibit 7. [Tr. p. 120.]

The California Vehicle Code distinguishes between registration and ownership.

See:

Cal. Veh. Code, Secs. 151.1, 156, 159, 160, 164.

That Appellee also knew that there was a distinction between registration and ownership was admitted by Mr. Merritt [Tr. pp. 369-371] and is evidenced by the fact that subsequent to the accident with Appellant Chisato Yoshida, the language of the Certificate of Financial Responsibility was changed to read that Appellee's insurance covered the operation by the insured of any motor vehicle "*not owned by nor registered to*" the insured. Plaintiff's Exhibit 19. [Tr. pp. 343-346, 369-371, 399, 400.]

In the instant case, 1952 registration on Gonzales' Chevrolet expired on December 31, 1952. Gonzales did not obtain 1953 registration until after the date of the accident with Appellant Chisato Yoshida. Plaintiff's Exhibit 17. [Tr. pp. 5, 143, 144, 160.]

In *Rainey v. Ross*, 106 Cal. App. 2d 286, 235 P. 2d 45 (1951), the Court stated on pages 292 and 293 as follows:

“When a person’s vehicle is registered for a given year (as was respondent’s in 1944) and he observes these reregistration requirements for the ensuing year (as did respondent in 1945), there is no period of time during which the vehicle is not ‘registered.’ The hiatus that occurs incident to the imposition and payment of the annual license fee, checking of appropriate records in the department, and the issuance of the new registration card and the new license plates or devices, is more seeming than real. . . . When, as here, timely application for annual renewal is made, it all relates back to the beginning of the year.”

However, in the instant case, there was a hiatus in registration because Gonzales failed to register his automobile during the period allowed by law. Accordingly, at the time of the accident with Appellant Chisato Yoshida, the 1937 Chevrolet was not registered to Gonzales.

Appellee stated its insurance coverage in its Certificate of Financial Responsibility and the Department of Motor Vehicles issued an operator’s license to Gonzales in reliance thereon. Appellee cannot now assert that its insurance coverage was other than set forth in the Certificate. Such would effectively vitiate and defeat the purposes of the California Financial Responsibility Law.

In *Continental Casualty Co. v. Phoenix Construction Co.*, 46 A. C. 429, P. 2d (1956), the Court stated on page 440 that the Financial Responsibility Law is:

“ . . . designed to give monetary protection to that ever changing and tragically large group of

persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others. Such a law is remedial in nature and in the public interest is to be liberally construed to the end of fostering its objectives. (See *Wheeler v. O'Connell* (1937), 297 Mass. 549 [9 N. E. 2d 544, 111 A. L. R. 1038, 1041].) As said by Mr. Justice Heydenfeldt for this court long ago, and still the law, 'The rule of law in the construction of remedial statutes requires great liberality, and wherever the meaning is doubtful, it must be so construed as to extend the remedy.'"

Since the 1937 Chevrolet was not registered to Gonzales on the date of his accident with Appellant Chisato Yoshida, the automobile was covered within the meaning of Appellee's Certificate of Financial Responsibility, filed with the State of California under the Assigned Risk Plan. Appellee cannot claim coverage contrary to its Certificate of Financial Responsibility in reliance on which the Department of Motor Vehicles issued its operator's license to Gonzales. Thus, Appellee is liable under its policy to Appellants.

C. As a Matter of Law, Appellee Is Estopped to Assert That Its Policy Did Not Cover Gonzales in the Operation of the 1937 Chevrolet by Virtue of Its Conduct After Receiving Notice That Gonzales Acquired Said Automobile.

In *Allen v. Hance*, 161 Cal. 189, 118 Pac. 527 (1911), the California Supreme Court stated on page 196 as follows:

"Whatever may have worked the estoppel . . . it amounts to but this, that a man is forbidden to show the existence of a fact because by his past con-

duct, his declarations, his agreement, his deed or a judgment, it would work an injustice and an injury to his adversary to permit him to do so.”

Where only one inference can be drawn from the evidence, estoppel is a question of law.

Krobotzsch v. Middleton, 72 Cal. App. 2d 804, 815, 165 P. 2d 729 (1946).

Prior to the accident with Appellant Chisato Yoshida, Appellee received notice by mail from Gonzales and Olympic Insurance Company that Gonzales was the owner of the 1937 Chevrolet which was subsequently involved in said accident. Plaintiff's Exhibit 11. [Tr. pp. 4, 5, 122.]

Whatever notice Appellee's agents and employees acquired while acting in the course of their employment is imputed to Appellee.

Universal Pictures Company v. Harold Lloyd Corp., 162 F. 2d 354 (9th Cir., 1947).

Moreover, it was not necessary to show that Appellee had actual knowledge as to the ownership of the 1937 Chevrolet where the facts brought directly to Appellee's attention cast upon it the duty to inquire into other pertinent facts.

Motor T Company v. Great American Indemnity Co., 6 Cal. 2d 439, 58 P. 2d 374 (1936).

After receiving such notice, Appellee settled the Lopez claim asserted against Gonzales for the negligent operation of said automobile, advised Gonzales that he was receiving full protection in accordance with his policy coverage, forwarded claim blanks to be used by Gonzales in case of additional accidents and failed to advise Gon-

zales that he was not covered by Appellee's insurance while driving said automobile. Plaintiff's Exhibits 11 and 12. [Tr. pp. 5, 17, 122, 124, 199-205, 218-220.]

An estoppel may arise from silence where there is a duty to speak, where the party upon whom such duty rests has an opportunity to speak, and knowing that the circumstances require him to speak, remains silent.

People v. Ocean Shore R.R., 32 Cal. 2d 406, 421, 196 P. 2d 570 (1948);

Bettelheim v. Hagstrom Food Stores, 113 Cal. App. 2d 873, 249 P. 2d 301 (1952).

A duty to speak arises when in conscience and equity one ought to speak.

Altman v. McSullum, 107 Cal. App. 2d 847, 236 P. 2d 914 (1951).

Accordingly, Appellee, by failing to advise Gonzales that there was a question of coverage is estopped to deny liability under its policy.

Moreover, in *Indiana Lumbermen's Mutual Insurance Co. v. Janes*, 230 F. 2d 500 (5th Cir., 1956), the Court held that an insurer, by paying a claim, affirmed the existence of valid coverage. There the Court stated on page 504 as follows:

"Moreover, after all of these facts were fully known to the insurer as a consequence of the investigation of the Janes collision in March, 1953, and after notice to J. L. Forbes of cancellation of the policy in April had become effective, the insurer, by paying a substantial amount to him as the collision loss sustained by the insured vehicle, affirmed the existence of a valid contract between it and J. L.
. . ."

In the ordinary case, a person who applies for insurance expects to be covered according to his application. When the insurer settles the matter with another party after an accident, and fails to advise the insured that there is no coverage, he continues to believe that he is covered. Such conduct estops Appellee to deny coverage.

Snyder v. Redding Motors, 131 Cal. App. 2d 416, 280 P. 2d 811 (1955).

That Gonzales believed he was covered while driving said 1937 Chevrolet and relied on Appellee's conduct in the belief that he was insured, is the only reasonable inference to be drawn from the evidence.

In *Mahoning Investment Company v. United States*, 3 Fed. Supp. 622 (Ct. Cl., 1933), the Court stated on page 630 as follows:

"In most of the cases of estoppel by acquiescence it will be found that there is no direct proof that the party claiming the estoppel was misled, but this fact is found as a natural and ordinary inference from all of the circumstances of the case . . .

"All that is shown in these cases is that the acts of the party estopped were such as to mislead the party claiming the estoppel to continue in the course already begun, believing the same to be acceptable to the party estopped."

Accordingly, Appellee is estopped to deny coverage under the policy issued to Gonzales.

D. As a Matter of Law, Appellee Waived the Notice Provisions of Its Policy Pertaining to the Acquisition of Newly-Acquired Automobiles.

Appellee's insurance policy provided that if the insured gave notice within thirty days of the acquisition of a new automobile, such newly-acquired automobile would be covered under its policy. Plaintiff's Exhibit 8. [Tr. p. 121.]

In the instant case, Gonzales did not give notice of acquisition of the 1937 Chevrolet within thirty days. However, notice was subsequently given. Plaintiff's Exhibit 11. [Tr. p. 122.]

After receiving such notice, Appellee mailed a letter to Gonzales, which stated "Thank you for reporting this accident which is receiving our careful attention. You may be sure that you will receive full protection according to your policy coverage," along with additional claim blanks to be used in case of further accidents. Plaintiff's Exhibit 12. [Tr. pp. 5, 17, 124, 265, 268.] Subsequently, Appellee settled the Lopez accident claim by paying certain monies on behalf of Gonzales. Plaintiff's Exhibit 11. [Tr. pp. 5, 122.]

At no time after receiving such notice did Appellee inform Gonzales that he was not covered by insurance while driving the 1937 Chevrolet. The first time that Gonzales was advised that there was a question of coverage was after his accident with Appellant Chisato Yoshida. [Tr. pp. 17, 199-205, 218-220.]

A waiver will be implied from conduct on the part of an insurer which is sufficient to justify a reasonable belief on the part of the insured that the company will not insist upon compliance with policy provisions.

Spiegelman v. Metropolitan Life Ins. Co., 21 Cal. App. 2d 299, 68 P. 2d 1006 (1937);

Francis v. Iowa National Fire Ins. Co., 112 Cal. App. 565, 297 Pac. 122 (1931).

Where a party to a transaction induces another to act on the reasonable belief that he has waived or will waive certain rights which he is entitled to assert, he will be estopped to insist on such rights to the prejudice of the one misled.

Baker v. Humphrey, 101 U. S. 494;
31 C. J. S. 344.

In *Farrar v. Policyholders Life Ins. Assn.*, 3 Cal. App. 2d 87, 39 P. 2d 229 (1934), the Court stated on page 94:

“The weight of authority supports the proposition that an insurance company waives or is estopped to assert a violation of the terms of an insurance contract if the company, on being notified of the violation, remains silent and fails to object or to declare a forfeiture, or cancel or rescind the contract, within a reasonable time. This rule is no doubt in most cases based on the theory that it is a breach of good faith on the part of an insurance company to remain silent and inactive on notice of a breach, and to retain the unearned premiums, and so lead the insured to believe that his insurance contract is regarded as valid notwithstanding the breach.”

Thus, Appellee has waived the 30-day notice provision of its policy and is estopped to deny coverage against Gonzales.

Moreover, that which operates as a waiver or estoppel in favor of an assured under an automobile liability policy also operates as a waiver or estoppel in favor of an injured person suing the insurer.

Indemnity Insurance Co. v. Forest, 44 F. 2d 465 (9th Cir., 1930);

Wheeler v. Lumbermens Mutual Casualty Co., 5 Fed. Supp. 193 (Me., 1953);

Olds v. General Accident Fire Etc. Corp., 67 Cal. App. 2d 812, 821, 824, 155 P. 2d 676 (1945);

Walters v. West American Ins. Co., 4 Cal. App. 2d 581, 586, 41 P. 2d 355 (1935);

Killeen v. General Accident Etc. Corp., 227 N. Y. Supp. 220.

III.

The Trial Court Committed Prejudicial Error in the Admission of Certain Evidence and Exclusion of Other Evidence.

A. The Trial Court Committed Prejudicial Error in Admitting Into Evidence the Operator's License Issued to Gonzales.

Defendant's Exhibit C is the California Operator's License, dated June 15, 1952, which was issued to Gonzales by the California Department of Motor Vehicles. A notation on the reverse side of the license states that it was limited to the operation of motor vehicles which were not registered in the name of the Licensee. [Tr. pp. 299-300.]

Appellants objected to the admission into evidence of said license on the ground that said license was irrelevant and immaterial because it was issued by the Department of Motor Vehicles *after* Appellee had issued its insurance policy and the restriction was placed on the reverse

side thereof because Appellee filed a restricted Certificate of Financial Responsibility with the Department of Motor Vehicles. [Tr. p. 300.]

The Trial Court may have been misled by the restriction on the operator's license to conclude that Appellee's policy did not cover Gonzales in the operation of the 1937 Chevrolet because the Department of Motor Vehicles had issued a restricted license to Gonzales.

However, Appellee did not act because of a requirement of the Department of Motor Vehicles. Rather, the Department issued its restricted license because of Appellee's wrongful conduct in filing a restricted Certificate of Financial Responsibility. Under California Vehicle Code, Section 415.5, the Department of Motor Vehicles was required to place on Gonzales' operator's license the identical restriction imposed by Appellee in its Certificate of Financial Responsibility.

Accordingly, the operator's license was immaterial and irrelevant in proving or disproving Appellee's liability under its policy. Moreover, since the Trial Court made a finding of fact with reference to the license it would appear that such license misled the Trial Court to conclude in favor of Appellee on the issue of whether Appellee's policy was in fact restricted by the special non-owner endorsement. [Tr. pp. 63-64.] Thus, such error was prejudicial.

B. The Trial Court Committed Prejudicial Error in Admitting Evidence of Premium Charges for Unrestricted Insurance Policies.

Mr. Merritt testified that the premium charged and paid by Gonzales for Appellee's insurance was \$24.51. Mr. Merritt further testified, over objection of Appellants

on the grounds of irrelevancy and immaterially, that at that time the premium for a policy extending coverage to an automobile owned by an insured would have been approximately \$110.00. [Tr. pp. 316-317, 331, 382, 383.]

The Trial Court found that Gonzales paid Appellee \$24.51 as premium for his policy and that the premium that would have been charged for a comparable policy covering owned automobiles would have been \$110.00. [Tr. pp. 62-63.]

Such finding establishes that the Trial Court was misled by said evidence to conclude that a "non-owner" restricted policy had in fact been issued and to reject the testimony of Mrs. Gonzales that no non-owner endorsement was attached to the policy mailed to Gonzales. [Tr. pp. 259-260.]

Under California Law the fact that the premium charged by Appellee was lower than customarily charged for a policy covering owned automobiles is immaterial.

Motor T Company v. Great American Indemnity Co., 6 Cal. 2d 439, 448, 58 P. 2d 374 (1936).

In the *Motor T Company* case, *supra*, the Court stated on page 448 as follows:

"In the instant case, specific coverage was requested for a particular car; the Colburn transaction involving that car was called to the attention of the agent who negotiated for the insurance as the representative of the company; and in the policy itself the name of Paul Colburn appeared. Under these circumstances the company must be held bound to give the protection thus contracted for, and it cannot be permitted to perpetrate what would undoubtedly be a fraud on the insured by relying upon the exclusion clause of the policy. The fact that the premium differs in a non-ownership policy is utterly imma-

terial. Plaintiff paid the premium charged for the coverage requested, and if by some mistake it was not charged the proper premium, it is no doubt possible to recover the deficiency.”

Accordingly, in view of the Trial Court’s findings, admission of evidence of higher premium charges was prejudicial error.

C. The Trial Court Committed Prejudicial Error in Admitting Mr. Merritt’s Testimony on the Issue of Waiver.

Appellee asked Mr. Merritt to state whether it was the intention of Appellee to waive any policy provisions when payment was made on the Lopez accident claim. [Tr. p. 366.]

Objection was made on the ground that the secret, undisclosed intention of Appellee was irrelevant and immaterial to establish whether the insured relied upon Appellee’s conduct and that there was no foundation to show that Mr. Merritt knew the intention of Appellee’s employee who actually made or ordered payment of said Lopez claim. [Tr. pp. 366-367.]

The Trial Court overruled Appellants’ objections and subsequently found that the Lopez claim was paid by mistake and that Appellee by payment of said claim did not waive nor intend to waive any policy provision in its favor. [Tr. pp. 65-66.]

In *Jones v. Maria*, 48 Cal. App. 171, 191 Pac. 943 (1920), the Court stated on page 173 as follows:

“Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right—an election by one to forego some advantage he could have taken or insisted upon. A person who is in a position to

assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such right. Once such right is waived, it is gone forever; the person who has waived the right will thereafter be precluded from asserting it."

The general rule is stated in 92 C. J. S. 1061 and 67 C. J. 304 that the intention essential to establish waiver is not the secret intention of a party. Intention is manifested by conduct or words in relation to the matter involved and the secret, undisclosed intent of a party is immaterial on the issue of waiver.

Even if such secret, undisclosed intention was material, Mr. Merritt rendered a mere conclusion as to the intention of the person settling the Lopez claim. There was no foundation that Mr. Merritt was familiar with anything that transpired in connection with the Lopez claim. Yet the Trial Court admitted the bald conclusions of Mr. Merritt and found in accordance therewith.

That such error was prejudicial is established by the fact that Mr. Merritt's testimony was the only evidence supporting the finding of the Trial Court that Appellee did not intend to waive the policy provisions in its favor by virtue of its conduct in the Lopez matter.

D. The Trial Court Committed Prejudicial Error in Excluding Evidence of Gonzales' Belief That He Was Covered by Appellee's Insurance and in Excluding Conversations Between Gonzales and Mrs. Gonzales.

The Trial Court sustained Appellee's objections to questions directed at Gonzales to establish whether he believed that Appellee's insurance protected him after Gonzales received correspondence from Appellee subsequent to the Lopez accident. [Tr. pp. 201-202, 245-246.]

Such questions were intended to establish Gonzales' reliance on Appellee's conduct as a basis of establishing estoppel. As such they were admissible.

See:

31 C. J. S. 267 (reliance as an element of estoppel).

Moreover, as a basis for establishing Appellee's estoppel, questions were asked of Mrs. Gonzales to establish whether she told Gonzales the contents of correspondence received from Appellee subsequent to the Lopez accident. Objections were sustained by the Trial Court on the ground that the questions called for hearsay. [Tr. pp. 264, 265, 269-270.]

The questions were asked because Gonzales cannot read [Tr. p. 181] and to further establish Gonzales' knowledge of the contents of said correspondence as a basis of proving his reliance on Appellee's conduct. As such the questions did not call for hearsay.

Werner v. State Bar, 24 Cal. 2d 611, 150 P. 2d 892 (1944);

19 Cal. Jur. 2d 109.

In the *Werner v. State Bar* case, *supra*, the Court stated on page 621 as follows:

"The hearsay rule, however, does not forbid the introduction of evidence that a statement has been made when the making of the statement is significant, irrespective of the truth or falsity of its content."

Accordingly, the exclusion of such evidence was harmful error because it may have misled the Trial Court to conclude that Appellants had failed to prove reliance as an element of estoppel.

IV.

The Trial Court Failed to Make Findings on All Material Issues Raised by the Pleadings.

It is elementary that failure to find on all material issues raised by the pleadings is a ground for reversal.

Kaiser v. Mansfield, 141 A. C. A. 485, 490,
P. 2d (1956);

Parker v. Shell Oil Co., 29 Cal. 2d 503, 512, 175
P. 2d 838 (1946).

Appellants' First Amended Complaint alleges in alternative causes of action that Appellee was estopped to deny coverage in this case by virtue of (1) the application filed by Gonzales, (2) its payment of the Lopez claim, and (3) its conduct subsequent to payment of the Lopez claim. The Trial Court made no findings with reference to the estoppel alleged in the pleadings.

The allegations of estoppel were the essence of Appellants' case. Was Appellee estopped to deny that its insurance policy was other than the type covering Gonzales as "owner and operator" as requested in the application? Was Appellee estopped to deny coverage by virtue of its settling of the Lopez accident claim? Was Appellee estopped to deny coverage by virtue of its conduct after the Lopez accident? The findings are silent on these vital issues.

The Trial Court did find generally that all allegations of the First Amended Complaint, not otherwise found to be true, were untrue and concluded that any other findings would be immaterial. [Tr. p. 70.]

However, such general findings are not sufficient under the Federal Rules of Civil Procedure. Federal Rules of Civil Procedure, Rule 52(a), requires the Trial Court to

find the facts specially. There were no special findings on the issue of estoppel.

The only mention of estoppel is set forth in the Conclusions of Law wherein the Trial Court concludes generally and as a matter of law that Appellee was not estopped to deny liability or coverage under the provisions of its insurance policy. [Tr. p. 71.]

However, unless only one inference can be drawn from the evidence, estoppel is a question of fact.

Krobitzsch v. Middleton, 72 Cal. App. 2d 804, 815, 165 P. 2d 729 (1946).

Surely, it cannot be seriously urged that the issue of estoppel was so overwhelmingly in favor of Appellee that only one conclusion was justified as a matter of law. The failure to make such findings of fact justifies reversal.

Conclusion.

Appellee issued an insurance policy to Gonzales and Gonzales paid the premium demanded by Appellee. Until Appellee faced substantial liability by virtue of the severe and lasting injuries inflicted by Gonzales upon Appellant Chisato Yoshida, Appellee was content to allow Gonzales to believe that he was protected by Appellee's insurance. However, when the risk of paying a large sum of money under its policy became apparent, Appellee callously and without regard for any obligation under the California Financial Responsibility Law, denied coverage.

At a time when potential liability was minor, Appellee acknowledged its policy. At a time when potential liability was great, Appellee disavowed its policy. Appellee in good conscience should not be able to blame such con-

duct upon mistake; and if mistake was the cause, Appellee should pay the price of its errors. The California Financial Responsibility Laws were designed to protect innocent persons similarly situated to Appellants. Justice in this case demands that Appellee accept its obligations under such Laws. The judgment should be reversed and judgment should be entered in favor of Appellants.

Respectfully submitted,

ARTHUR N. GREENBERG,

Attorney for Appellants.

No. 15121

In the
United States Court of Appeals
For the Ninth Circuit

MATSUO YOSHIDA and CHISATO
YOSHIDA,

Appellants,

vs.

LIBERTY MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

Appellee's Reply Brief

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FILED

AUG 27 1956



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In the
United States Court of Appeals
For the Ninth Circuit

MATSUO YOSHIDA and CHISATO
YOSHIDA,

Appellants,

vs.

LIBERTY MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

No. 15121

Appellee's Reply Brief

I.

CHRONOLOGY OF EVENTS

1. Gonzales' Driver's License Suspended.

On January 21, 1952, the Department of Motor Vehicles of the State of California suspended the driver's license of Sylvester M. Gonzales until he gave proof of ability to respond in damages as set forth in Section 414 of the California Vehicle Code. Defendant's Exhibit J; (Tr. p. 385). Said suspension order further provided as follows:

“Proof of ability to respond in damages is usually furnished by means of a financial responsibility insurance certificate filed with the Department of Motor Vehicles by an insurance company. If your insurance representative is not familiar with the requirements, ask him to contact the California Automobile Assigned Risk Plan, 200 Bush Street, San Francisco, California.”

2. Application of Gonzales to the California Automobile Assigned Risk Plan.

On or about April 3, 1952, Gonzales filed his application for insurance under the California Automobile Assigned Risk Plan with his insurance representative and agent, Biebrach, Bruce and Moore, Inc., 40 West San Antonio Street, San Jose, California. The application was on a printed form furnished by the California Automobile Assigned Risk Plan. Plaintiffs' Exhibit 3; (Tr. p. 119). Under Item 10 of said application space is provided for the description of all automobiles registered in the applicant's name. It will be observed that no automobile is described in this space. Answering Item 15 of said application Gonzales wrote the answer “No” indicating that he did not have an auto registration in California. Answering Item 16 Gonzales wrote the answer “No” indicating that he did not have an operator's license in the State of California.

Gonzales testified by deposition that at the time his application was filed he did not own an automobile. (Tr. p. 217, L. 18-20). Neither did Gonzales have an

operator's license in the State of California at said time. (Tr. p. 221, L. 11-13).

The contention of appellants that Gonzales was illiterate and could not read the application is disputed by his own deposition testimony. He had completed two years in High School. (Tr. pp. 209-215). Appellee had nothing whatever to do with the preparation of the application or with the filing of the same. Said application was prepared under the supervision of the insurance representative of Gonzales. There was no opportunity afforded the appellee to review or approve the application. The failure of Gonzales to answer all of the questions set forth in the application was the sole responsibility of Gonzales; his insurance representative who was his agent, and the California Automobile Assigned Risk Plan. The reference at the top of page 18 of the appellants' Opening Brief to the footnote at the bottom of page 2 of the application is relied upon by the appellants to place the responsibility on the appellee for the alleged deficiencies which appear in the application. However the appellants leave out that part of said footnote which states "Note to Applicant and Producer." It is therefore apparent that the responsibility of reviewing said application rests solely with the applicant and producer. The first notice the appellee had concerning said application was when the same was mailed to appellee by the California Automobile Assigned Risk Plan.

Appellants lay considerable stress in support of their claims to the answers that Gonzales gave to Item 27 of the application which states:

“Are you required to file evidence of financial responsibility?” and the answer is “Yes.”

“If the answer is ‘yes’ what form of certificate is required by the Motor Vehicle Department?” And after the following phrase, to-wit: “Owner and Operator.”

Gonzales placed a cross. Appellants therefore assert that the indication by Gonzales that he was required by the Motor Vehicle Department to furnish a certificate that he was the owner and operator of an automobile was notice to the appellee that it should have issued an owner policy instead of a non-owner policy. However, the appellants entirely overlook the fact that the application on page 1, Item 10, clearly indicates that Gonzales did not own an automobile, and also that he was not driving an automobile for the reason that he did not have an operator’s license in this State. (Items 15 and 16 of the application). Furthermore Gonzales testified in his deposition, as hereinafter pointed out, that he did not own an automobile and did not have a driver’s license. Neither was Gonzales required under the order of the Motor Vehicle Department suspending his license to furnish a certificate of “Owner and Operator.” Defendant’s Exhibit J.

3. Letter to Appellee From the California Automobile Assigned Risk Plan.

The application of Gonzales was filed by his agent who was the producer with the California Automobile Assigned Risk Plan. On April 15, 1952, said plan for-

warded the application together with a letter of instructions, to the appellee. Plaintiffs' Exhibit 4, (Tr. p. 120); testimony of Mr. Merritt, (Tr. p. 311).

4. Investigation of Gonzales.

After receiving the application of Gonzales and the letter from the California Automobile Assigned Risk Plan the appellee received a report concerning an investigation which was made, or should have been made, with reference to Gonzales. A written report was furnished the appellee which was introduced in evidence as Plaintiffs' Exhibit 5. (Tr. p. 120). Said report states as follows:

“Car. This car was not seen but at time of inspection was stated to be in good mechanical and operational condition. It is used for his own personal pleasure and . . . in local area. When not in use it is garaged at home.”

Appellants contend that said investigation report was notice to the appellee that Gonzales owned an automobile at the time the insurance policy was issued. However said report merely refers to a car and there is no reference whatever to its ownership. Typical of most investigation reports the investigator was apparently investigating some person other than Gonzales. Gonzales testified in his deposition that he did not own an automobile when his application for insurance was filed, and further that he did not have a driver's license at said time. As hereinabove stated, the driver's license of Gonzales was suspended on January 21, 1952, and if Gonzales was driving any automobile at the time

of said investigation he would be guilty of a crime. The presumption that he was innocent of committing a crime would apply. Gonzales testified in his deposition that the first car he got after the insurance policy was issued, was when he obtained his operator's license, (Tr. p. 191) which the record shows was issued to him on June 15, 1952. Defendant's Exhibit C. (Tr. p. 299). There is nothing in the investigator's report which constitutes notice to the appellee that Gonzales owned an automobile at the time the insurance policy was issued, to-wit, May 3, 1952, and if any such inference can be made from said report it is dissolved by Gonzales in his sworn application for insurance and in his deposition.

5. Gonzales' Insurance Policy.

Jame H. Merritt, a witness called by the appellee, testified that he was the underwriting manager, Pacific Division, of the appellee corporation. He produced and identified the original records of the appellee pertaining to the automobile insurance policy issued to Gonzales, consisting of the following documents:

1. Declaration sheet which he read into the record as follows:

Sylvester M. Gonzales is the name of the insured; the policy number is AN61-P18692A; the address of Gonzales is 1539 East Santa Clara Street, San Jose; the effective date of the policy May 3, 1952 to May 3, 1953. In Item #3 of the declaration sheet, which is the space where the description of the automobile or other

pertinent facts are given, it is stated "Named Operator's Policy 7921," which means that instead of insuring Gonzales for the ownership of an automobile, it is a restricted policy in that it applies only while Gonzales is operating an automobile not owned or registered by him, in accordance with an endorsement which it attached to and forms a part of the policy.

2. The next document identified by Mr. Merritt was stated by him to be an endorsement which formed a part of the policy; that it was issued at the time the policy itself was prepared and it indicates that the policy is a non-owner policy, and in accordance with the terms of the policy and the endorsement the insurance does not apply with respect to any automobile owned by Gonzales or a member of his household other than a private chauffeur or domestic servant. The declaration sheet and the endorsement were introduced in evidence as Defendant's Exhibit I. (Tr. p. 325). Mr. Merritt further testified that both the declaration sheet and the endorsement were a part of the policy which was mailed to Gonzales. Mr. Merritt identified Plaintiffs' Exhibit 8, which he said was the policy jacket; that it contained the so-called basic terms of the policy and that it is a general form that is used in connection with all automobile policies in California; that the same type of jacket was mailed to Gonzales. Mr. Merritt then testified that the declaration sheet and the endorsement were attached to an inside page of the jacket, page 3, so that when the policy is open page 1 and page 2, and then this other page turned at the declaration and the endorsement on top would have

been attached right there; that it is correct that the policy which was mailed to Gonzales included the jacket, which is Plaintiffs' Exhibit 8, and the declaration sheet and the non-owner policy endorsement, Defendant's Exhibit I. (Tr. pp. 303-310).

Mr. Merritt further testified that a copy of the declaration sheet and endorsement contained in the Gonzales policy were mailed to his agent, Biebrach, Bruch and Moore, Inc. (Tr. p. 360). Gonzales testified in his deposition that an insurance policy arrived at his home. (Tr. p. 191). On cross-examination Mr. Merritt testified that the automobile policy issued to Gonzales consisted of the jacket, Plaintiffs' Exhibit 8, and the declaration sheet and the non-owner endorsement, Defendant's Exhibit I. (Tr. p. 326).

The following provisions of the jacket, Plaintiffs' Exhibit 8, are pertinent, to-wit: Article IV, paragraph 4, which provides:

“Newly Acquired Automobile — an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium

required because of the application of the insurance to such newly acquired automobile.”

Also Article 12, which reads as follows :

“Action Against Company—Coverages A and B. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured’s obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured’s liability. Bankruptcy or insolvency of the insured or of the insured’s estate shall not relieve the company of any of its obligations hereunder.”

The non-owner policy endorsement, Defendant’s Exhibit I, so far as applicable, contains the following restriction :

“2. The insurance does not apply :

(a) to any automobile owned by the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;”

6. California Financial Responsibility Act Insurance Certificate.

Mr. Merritt testified that the appellee filed a certificate of financial responsibility with the California Department of Motor Vehicles which stated in substance that the appellee certifies that it has issued to or for the benefit of Sylvester M. Gonzales a motor vehicle liability policy as defined in Section 415 of the Motor Vehicle Code of the State of California. Mr. Merritt identified Plaintiffs' Exhibit 7 as the certificate which was filed by the appellee. This certificate shows that appellee had issued its policy to Gonzales covering the operation of any motor vehicle not registered to Gonzales and that said policy was "Named Operator's Policy 7921." The endorsement on said certificate, Plaintiffs' Exhibit 7, read as follows:

"For use of The Department of Motor Vehicles Only. The original of this certificate was accepted on 5/23/1952 lmw under Section 415 of the Vehicle Code of the State of California as proof of ability to respond in damages.

This copy to be returned to Liberty Mutual Insurance Company, Boston, Massachusetts."

Mr. Merritt further testified that the certificate form, Plaintiffs' Exhibit 7, is furnished by the State of California, (Tr. p. 339), and further stated that the intent of the appellee as an insurance carrier was to file a certificate with the Financial Responsibility Act in accordance with application, Plaintiffs' Exhibit 3, which said that there was no auto registration,

that the man (Gonzales) had no auto registration of this State and accordingly the appellee filed an operator's policy covering the operation of any motor vehicle not registered to the insured. (Tr. pp. 342-343). Obviously this was the right certificate as it was approved by the Department of Motor Vehicles.

7. Restricted Operator's License Issued to Gonzales.

On June 15, 1952, the Department of Motor Vehicles of the State of California, Division of Driver's Licenses, issued to Sylvester M. Gonzales an operator's license which contained the following restriction:

“O.K. to add ins. restr. limited to operating vehicles which are not registered in the name of the licensee. 6-10-1952, lmw.” Defendant's Exhibit C, (Tr. p. 299).

8. Gonzales Purchases a Ford Automobile.

Gonzales testified in his deposition that when he filled out his application he did not own an automobile but that after he got his operator's license he bought a Ford, which would be subsequent to June 15, 1952; that he bought the Ford in San Jose. In about two or two and one-half months after he bought the Ford he bought the Chevrolet; that he trade the Ford in on the Chevrolet; that he never gave notice or wrote a letter or sent any communication to the Liberty Mutual Insurance Company that he had bought a Ford and that he never wrote a letter or gave notice to the Liberty Mutual Insurance Company that he bought a

Chevrolet; that he never went to the office of the Liberty Mutual Insurance Company at any time until after the Yoshida accident, which was April 15, 1953. (Tr. pp. 217-224).

9. Gonzales Purchases a Chevrolet Automobile.

Gonzales purchased a Chevrolet automobile from O. K. Morton, San Jose, California. Plaintiffs' Exhibit 10. (Tr. p. 121). Said Exhibit 10 includes, among other matters, the following "Register to: Sylvester Gonzales." As hereinabove pointed out, Gonzales never gave notice of any kind to the appellee that he had purchased a Chevrolet automobile.

10. Registration of Chevrolet Automobile.

Subsequent to purchasing the Chevrolet there was issued to Gonzales by the Department of Motor Vehicles of the State of California an automobile certificate of ownership showing that he was the owner of a Chevrolet automobile in the year 1952. Defendants' Exhibit D, (Tr. p. 301).

11. The Lopez Accident.

In January, 1953, Gonzales claimed he was involved in an automobile accident with one Lopez. An accident report was filed with the appellee and there was certain correspondence with the appellee with reference to said accident. Plaintiffs' Exhibit 11, (Tr. p. 122). The appellee paid the claim that was filed by Lopez through an error and by mistake. The appel-

lants contend that the payment of the Lopez claim constituted a waiver by and estoppel of the appellee to deny liability to the appellants under the Gonzales non-owner automobile insurance policy. Mr. Merritt testified that said claim was paid because of a clerical error made by the clerk that completed the classification sheet in that the classification sheet failed to point out that the Gonzales policy contained a non-owner endorsement; that the appellee in paying the Lopez claim did so without any intention of the appellee thereby to waive any of the provisions of the Gonzales policy; that the appellee absolutely had no such intention and that the basis of the payment of the claim was purely an error on the part of the clerk who completed the classification sheet. (Tr. pp. 364-367). Appellants strenuously contend that the appellee as a matter of law is estopped to assert that its policy did not cover the Yoshida accident because as appellants claim Gonzales after the settlement of the Lopez claim believed he was covered while driving his Chevrolet automobile. There is no evidence that Gonzales ever knew that the Lopez claim was settled. On June 25, 1953, Sylvester Gonzales signed, swore to and filed a certificate of non-operation with the California Department of Motor Vehicles and stated therein as follows:

“The undersigned hereby certifies that Chevy 6 Engine No. 234531 was not operated from Dec. 31, 1952, inclusive, to June 25, 1953, inclusive; affiant further says that the above described vehicle was in storage during said entire time at Address 1814 Kearney, Los Angeles or was not operated on Cali-

fornia highways by reason of the following facts: Not in running condition (signed) Sylvester M. Gonzales, Address 1814 Kearney St., L. A. Calif.”

Defendant's Exhibit E, (Tr. p. 301). The above described Chevy is the car that was involved in the Yoshida accident.

In addition to the complete absence of any evidence to support the doctrine of estoppel or waiver against the appellee it is difficult to understand how Gonzales believed that he was covered by the appellee's insurance policy in driving his Chevrolet automobile after the Lopez accident when he swore in his non-operation certificate that he had not driven said Chevrolet at any time during the period from December 31, 1952, to June 25, 1953. The appellee will elaborate on the failure of the appellants to show estoppel or waiver under the heading “Argument of the Law.”

12. The Yoshida Accident.

On April 15, 1953, Gonzales was involved in an automobile accident with Mrs. Yoshida, who was a pedestrian. Plaintiffs' Exhibit 13. This is the accident upon which the appellants complaint in this case based. After the Yoshida accident occurred the investigation made by the appellee disclosed that the Chevrolet automobile which Gonzales was driving at the time of the Yoshida accident was owned by Gonzales and was registered to him, whereupon the appellee disclaimed any liability to Gonzales under its non-owner automobile insurance policy issued to Gonzales on May 3, 1952.

Defendant's Exhibits F and G, (Tr. p. 302) and Defendant's Exhibit H, (Tr. p. 303).

ARGUMENT OF THE LAW

A

The Rule of Construction of the Policy

Appellee refers to the decision of this Honorable Court in the case of *Home Indemnity Company of New York v. Standard Accident Co.*, 167 Fed. 2d, 919, 923, 924, in reply to all of the authorities cited by appellants on pages 11 to 14, inclusive, of their Opening Brief. The atmosphere of confusion which appellants attempt to create from their strained interpretation and application of the ordinary words "owner" and "registration," as used in the Gonzales insurance policy and the other documents introduced in evidence at the trial, is nothing more than semantic quibbling. The insurance policy is restricted by the non-owner endorsement covering the insured only when he was driving an automobile which was not owned by him. Defendant's Exhibit I. The Chevrolet automobile that was involved in the Yoshida accident was owned by Gonzales. Furthermore Gonzales did not notify the appellee at any time that he had acquired the ownership of said Chevrolet as required by Article IV, paragraph (4) of the policy, hereinabove set forth. Plaintiffs' Exhibit 8. There is no uncertainty or ambiguity in the insurance policy, including the jacket. Plaintiffs' Exhibit 8, or the declaration sheet or the non-owner endorsement attached to the policy. Defendant's Exhibit I. The opinion of this Honorable Court

in the above cited case lays down the principle of the law of construction which is applicable under the circumstances and evidence in this case at pages 923 and 924 as follows:

“[2] The ancient rule that all intendments in an insurance policy are to be construed favorable to the insured has one important limitation; namely, that where the language of any given provision of the policy is clear, that language must be followed. In other words, where there is no ambiguity, there is nothing left to be construed. In such a situation, when a party seeks to read something into the contract of insurance that is not there, a court must perforce say, with Shylock,—

‘Is it so nominated in the bond? . . .

I cannot find it; ‘tis not in the bond.’

This is the teaching of the cases in California and elsewhere. In *Carabelli v. Mountain States Life Ins. Co.*, 8 Cal. App. 2d 115, 117, 118, 46 P. 2d 1004, 1006, hearing denied by the Supreme Court of the State, the court said:

‘The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon, and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms. Thus the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity. [Cases Cited].’

The same doctrine has been recognized by this court.

In *Fidelity Union Fire Ins. Co. v. Kelleher*, 9 Cir., 13 F. 2d 745, 746, Judge Hunt said:

“Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms. In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231, the court said:

‘It is immaterial to consider the reason for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made.’ ”

See also:

Standard Accident Ins. Co. of Detroit, Mich. v. Winget, 197 Fed. 2d, 97, 107;

Hawkeye-Security Insurance Co. v. Meyers, 210 Fed. 2d, 890, 893;

Nettles v. General Accident Fire and Life Assurance Corporation, 234 F. 2d, 243, 247.

B

The Yoshida Accident was Not Covered by the Policy

1. Under the terms of the Gonzales insurance policy and the non-owner endorsement Gonzales was not covered when driving an automobile owned by him. The Chevrolet automobile involved in the Yoshida accident was owned by Gonzales.

2. Gonzales did not give notice to appellee at any time that he had acquired the ownership of the Chevrolet automobile as required by Article IV, Paragraph (4) of the policy. The appellee was therefore entitled to deny liability under the terms of the policy for the Yoshida accident.

Home Indemnity Co. of New York v. Standard Accident Co., 167 Fed. 2d, 919, 923, 924;

Fidelity and Casualty Company of New York v. Reece, 223 Fed. 2d 1, 114;

Iowa National Mutual Ins. Co. v. Richards, 229 Fed. 2d, 210;

Olds v. General Accident Fire etc. Corp., 67 C. A. 2d, 812, 821, 155 P. 2d 676; hearing denied by Supreme Court;

Kindred v. Pacific Auto Ins. Co., 10 C. 2d, 463, 465, 466;

State Compensation Ins. Fund v. Bankers Indem. Ins. Co., 106 Fed. 2d, 368;

Carabelli v. Mountain States Life Ins. Co., 8 Cal. App. 2d, 115, 117, 118; (Petition for hearing denied by the Supreme Court);

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Purcell v. Pacific Automobile Ins. Co., 19 C. A. 2d, 230; (Petition for hearing in Supreme Court denied);

Margellini v. Pacific Automobile Ins. Co., 33 C. A. 2d, 93; (Petition for hearing in the Supreme Court denied);

American Motorists Ins. Co. v. Moses, 111 C. A. 2d, 444; (Petition for hearing by the Supreme Court denied);

Globe Indemnity Co. v. Liberty Mut. Ins. Co., 138 Fed. 2d 180, 184;

Collins v. United States, 161 Fed. 2d, 67, Syl. 2-4;

Fidelity and Casualty Company of New York v. Reece, 223 Fed. 2d, 114.

C

Insurance Producer was Agent of Gonzales

The firm of Biebrach, Bruch and Moore, Inc., who appeared on Gonzales' application for insurance, Plaintiffs' Exhibit 3, as the producer of record was the agent of Gonzales.

Iowa National Mutual Ins. Co. v. Richards, 229 Fed. 2d, 210.

D

The Doctrine of Estoppel or Waiver Is Not Applicable

The appellants claim that the appellee is estopped from denying liability on the Gonzales policy because of its payment of the Lopez claim. However, the only evidence in the record concerning the circumstances which caused the payment of the Lopez claim is the testimony of Mr. Merritt, who testified that the payment of said claim by the appellee was brought about by a clerical error, and it was not the intention of the appellee to waive any of the provisions of the Gonzales insurance policy in making said payment. The appellants offered no evidence whatever to contradict the testimony of Mr. Merritt and it is therefore undisputed that the appellee is not estopped or did not waive any of its rights under the Gonzales insurance policy by erroneously paying the Lopez claim. The application of the rule of estoppel under the circumstances in this case is stated by the Supreme Court of the United States in the case of *Insurance Company v. Wolff*, 95 U. S., 326, 24 L. Ed. 387, as follows:

“The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is

essential that the Company sought to be estopped from denying the waiver claimed should be apprised of all the facts; of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it.”

See also:

McDaniels v. General Ins. Co., 1 Cal. App. 2d, 454, 459, 460, 461, 462;

Mirich v. Underwriters at Lloyd's London, 64 C. A. 2d, 522, 530, 531.

E

Conditions Precedent

Article 12 of the insurance policy, Plaintiffs' Exhibit 8, provides that the insured must fully comply with all of the terms of the policy as a condition precedent to bringing an action against the company on the policy. This provision is also applicable to the appellants as a condition precedent to the success of their lawsuit. The opinion of this Honorable Court in the Home Indemnity case hereinabove referred to correctly defines the law applicable to Article 12 of the insurance policy, at page 929, as follows:

“[6, 7] The appellant's policy specifies that ‘No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy’. There is nothing contrary to public policy in this provision, and it should be enforced according to its terms.

Under the Civil Code of California, a condition precedent is given the same force as that indicated in the policy that we are now considering. Section 1439 provides in part:

‘Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; . . . ’

In our opinion, the law governing conditions precedent in insurance contract is correctly stated in *Whittle v. Associated Indemnity Corporation*, 130 N.J.L. 576, 33 A. 2d 866, 868, 869, in which there was considered a policy having a clause in identically the same language as that quoted above. There the Court of Errors and Appeals said:

‘These conditions are not, as urged, conditions subsequent. . . . In the case at bar the stated conditions by the very terms of the policy (Condition 10) are made conditions precedent. . . . Moreover, we have held that they are ‘conditions in the nature of a promissory warranty,’ and that they are ‘conditions precedent to the right of recovery.’

. . . .

“And if the test were that it must be shown that the failure to fulfill the conditions precedent prejudiced the insurer, the trial judge might well have been justified, under the proofs, in submitting the case to the jury. But that is not the test. The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end . . . , for ‘there has been a failure to fulfill a condition upon which (insurer’s) obligation is dependent.’ *Coleman v. New Amsterdam Casualty Co.* [supra].

The 'construction and effect of a written instrument is a matter of law to be determined by the court and not by the trier of fact.' And in the absence of an infirmity in a contract (none is here alleged) our 'function' is to 'enforce a contract as it is written'. And if the 'insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.' . . . In short, the law does not make a better contract for the parties than they chose to make for themselves. [Case cited]."

"In the instant case, the 'insured cannot bring himself within the conditions of the policy.' Accordingly, we hold that 'no action shall lie against the company.' "

F

**The Appellants Stand in the Shoes of Gonzales
Quod the Policy**

*Home Indemnity Co. of New York v. Standard
Accident Insurance Company, supra ;*
Olds v. General Accident Co., supra ;
Kindred v. Auto Insurance Co., supra.

G

The Court's Findings

Appellants object to the sufficiency of the findings of the Court, but the appellee believes that the findings fully comply with FRCP Rule 52(a). Appellants are mistaken when they state there is no special finding on the issue of estoppel. Finding No. 15 covers the issue of estoppel and waiver. Also Conclusions of Law, Paragraph No. 6, on the issue of estoppel is likewise a finding of fact.

Carr v. Yokohama Species Bank, Ltd., 200 Fed.
2d, 251, 255;
Central Ry. Co. v. Longden, 194 Fed. 2d, 310,
317, 318;
Benrose Fabrics Corp. v. Rosenstein, 183 Fed.
2d, 355, 357.

CONCLUSION

For each and all of the foregoing reasons the judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

LYNDOL L. YOUNG,
Attorney for Appellee.



No. 15121.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MATSUO YOSHIDA and CHISATO YOSHIDA,

Appellants,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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FILED

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No. 15121.

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United States Court of Appeals

FOR THE NINTH CIRCUIT

MATSUO YOSHIDA and CHISATO YOSHIDA,

Appellants,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

Discussion of the Evidence.

Throughout its Reply Brief, Appellee attempts to justify its conduct by stating that its employees made numerous mistakes in connection with the issuance and processing of claims on the insurance policy issued to Sylvester M. Gonzales. Appellee inconsistently asserts, however, that Appellants should pay the price of Appellee's mistakes.

In addition, Appellee lists in its Chronology of Events conclusions not made by the Trial Court and not warranted by the evidence. These are discussed as follows:

1. Right of Appellee to Approve Gonzales' Application.

Appellee states on page 3 of its Reply Brief that it had no opportunity "to review or approve" Gonzales' application for insurance.

Such statement is contrary to the evidence and contrary to the law governing the California Assigned Risk Plan.

The evidence clearly established that before Appellee issued its insurance policy to Gonzales, it received his application from the California Assigned Risk Plan and was afforded an opportunity to examine the application. [Tr. p. 3.]

Moreover, under California Administrative Code, Title 10, Chapter 5, Subchapter 3, Article 8, governing the California Automobile Assigned Risk Plan, it is provided in Section 2450 that the insurer designated by the manager of the plan is given three days after receipt of an application in which to accept or reject the applicant under the rules governing the plan.

In addition, Appellee's investigation report stated that Gonzales was "known to be driving car at present time even though his license has been suspended." [Pltf. Ex. 5, Tr. p. 120.]

Under such circumstances, Appellee was entitled to reject Gonzales' application under the Assigned Risk Plan. Section 2431.3a of the plan states as follows:

"An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the committee that the applicant has operated a motor vehicle during the period of revocation or suspension of his operator's license, on more than one occasion."

Thus, in spite of the opportunity to reject Gonzales' application, Appellee chose to accept his premium and issue its policy to him after examination and review of his application and receipt of an investigation report.

2. Gonzales' Insurance Policy.

On pages 6 and 7 of its Reply Brief, Appellee states that Gonzales was issued a policy on which the words "Named operator's policy 7921" appeared, and that said words mean to an insurance underwriter that instead of insuring Gonzales for the ownership of an automobile it was a restricted policy applying only while Gonzales was operating an automobile not owned by nor registered to him.

Regardless of what an insurance underwriter might interpret such words to mean, they have no significance and are not binding upon an insured.

It is clearly established in California that an insurance policy has the meaning a layman would give it and not as an attorney or insurance expert might interpret it.

Hobson v. Mutual Benefit Health & Accident Assn.
(1950), 99 Cal. App. 2d 330, 221 P. 2d 761.

Thus, such words do not add to nor detract from the coverage afforded Gonzales.

3. Notice That Gonzales Purchased an Automobile.

Appellee states that Gonzales never gave notice to Appellee that he was the owner of the 1937 Chevrolet automobile and that only after the Yoshida accident, Appellee's investigation disclosed that said automobile was owned by Gonzales and registered to him. (Appellee's Reply Br., pp. 12, 14.)

That such is not true is established by the Findings of Fact prepared by Appellee wherein the Trial Court found that after the Lopez accident, and before the Yoshida accident, Gonzales gave Appellee notice that he was the owner of said 1937 Chevrolet. [Tr. p. 65.]

4. The Lopez Accident—Estoppel and Waiver.

Appellee argues that its conduct with respect to handling of the Lopez accident was caused by its errors and mistakes.

In its Reply Brief, on pages 20 and 21, Appellee quotes *Insurance Company v. Wolff* (1877), 95 U. S. 326, in support of the proposition that the doctrine of estoppel or waiver is not applicable in the instant case.

However, the *Wolff* case is solid authority for holding Appellee estopped to deny coverage in the instant case. The Supreme Court stated on page 333 that "the doctrine of estoppel or waiver can only be invoked where the conduct of the Company has been such as to wholly induce action and reliance upon it."

In this case, it is obvious that after the Lopez accident Gonzales relied upon Appellee's silence and assumed that he was covered by its insurance. (See Appellants' Op. Br. pp. 9-10, 23-26.)

Moreover, the Supreme Court stated on page 333 that "the doctrine of waiver and estoppel can be invoked only where it would operate as a fraud upon the assured if the insurer was afterward allowed to disallow its conduct and enforce the policy."

There could be no greater fraud upon Gonzales than to allow Appellee to disallow the contract at this late date and refuse to pay the judgment against its insured.

In addition, the portion quoted by Appellee states that before there can be a waiver or estoppel, the insurer should be appraised of all the facts. What more facts could Appellee have known than those received by it in connection with the Lopez accident which unequivocally appraised Appellee that Gonzales was the owner and operator of said 1937 Chevrolet automobile?

If ever the doctrine of estoppel or waiver is applicable it must be applied in the instant case.

Finally, Appellee urges that Gonzales cannot be assumed to have driven his car subsequent to the Lopez accident in view of his filing of a Certificate of Non-operation with the California Department of Motor Vehicles. The certificate stated that Gonzales did not operate the 1937 Chevrolet automobile between December 31, 1952, and June 25, 1953, and that during said period of time the automobile was in storage. [Deft. Ex. E, Tr. p. 301.]

However, Appellee omitted from its brief the fact that Gonzales testified that he drove the automobile during said period of time and that his automobile was not in storage; that he did not file a certificate with the Department of Motor Vehicles stating that said Chevrolet had not been driven during said period because of mechanical conditions [Tr. pp. 227-229]; that he could not read; that the certificate was filled in by an employee of the license bureau in Los Angeles; and that he never told said employee that his automobile was not in running condition from December 31, 1952, until the date of the certificate. [Tr. pp. 242, 244.]

Although Appellee urges that Gonzales can read, the Findings of Fact prepared by Appellee and signed by the Trial Court made no mention of Gonzales' literacy and the direct testimony of Gonzales, Mrs. Gonzales and Appellee's insurance adjuster unequivocally establishes that Gonzales could not read the certificate which he signed. [Tr. pp. 181, 392.] Thus, this argument must also fall.

ARGUMENT.

I.

Gonzales' 1937 Chevrolet Was Not an "Owned" Vehicle Within the Meaning of the Exclusion of Appellee's Insurance Policy.

Subsequent to the time that Appellants filed their Opening Brief, the California District Court of Appeal handed down its opinion in *Oil Base, Inc. v. Transport Indemnity Company* (1956), 143 A. C. A. 509, P. 2d

In the *Oil Base* case, *supra*, the policy covered the insured for liability arising out of accident excluding "with respect to any hired automobile, the owner thereof, or any employee of such owner."

Under the policy, the term "owned automobile" was defined as an automobile owned by the named insured. The term "hired automobile" was defined as one used under contract by or loan to the named insured and which is not owned or registered in its name.

The insured hired a vehicle from a party which had leased it from the owner. The question was whether the letter of the vehicle was covered or whether the letter was not protected under the policy because of the exclusion against "the owner of the hired vehicle."

The Court stated on pages 518-519 as follows:

"The word owner as applied to motor vehicles is commonly understood to designate the person in whom title is vested either as a legal owner or as a registered owner . . . no contention was made by counsel for any of the parties at the trial of this action that the word owner as used in the clause of the contract in question has any other meaning."

The Trial Court found that the letter was an “owner” of the vehicle and excluded under the policy under California Civil Code, Section 694, which defines ownership as the right to possess and use a thing to the exclusion of others. The Court of Appeal reversed.

The Court set forth the general proposition of California law on page 519 that:

“Exceptions in a contract of insurance are to be construed ‘most strongly against the insurer and in favor of the insured and if susceptible to two meanings, the one most favorable to the insured is to be adopted.’ ”

The Court further stated on page 519 that:

“The word ‘owner’ is certainly susceptible of meaning the legal or registered owner, and if we assume that it is also susceptible of meaning a person in possession under a lease, still the meaning that will grant coverage should be adopted. If it had been the intention of the insurer to except the letter of a hired vehicle who was not an owner from the coverage granted by the omnibus clause, it would have been a simple matter to have made the exception clear by the addition of the word ‘letter’ to that clause as to make it read, ‘with respect to any hired automobile, to the owner or letter thereof, or any employee of such owner or letter.’ ”

In the instant case, the findings of the Trial Court are not based upon any conflict in the evidence but are the legal conclusions or conclusions of fact arrived at in the interpretation of the insurance policy issued by Appellee to Gonzales. Therefore, any errors are those of law and

not of fact, and the findings are not binding upon the Court of Appeals.

Oil Base, Inc. v. Transport Indemnity Company (1956), 143 A. C. A. 509, 517, P. 2d; *Estate of Platt* (1942), 21 Cal. 2d 343, 352, 131 P. 2d 825;

Continental Casualty Company v. Phoenix Construction Company (1956), 46 A. C. 429, 435, 296 P. 2d 801.

The *Oil Base* case enunciates California law relevant to the instant action as follows:

1. The Appellate Court is not bound by the Trial Court's interpretation of an insurance policy.
2. An exclusion in an insurance policy is to be construed most strongly in favor of granting coverage.
3. The term "owner" appearing in an insurance policy is susceptible of more than one meaning. The meaning in favor of granting coverage is to be adopted by the Court.

Accordingly, in the instant case:

1. The exclusion in Appellee's insurance policy must be construed most strongly against Appellee.
2. The exclusion against owned automobiles is subject to more than one construction. Thus, the term must be construed against Appellee and in favor of extending coverage. Accordingly, in the instant case, since "title of ownership" did not pass to Gonzales until he paid the full purchase price, the Court must hold that Gonzales was not the owner within the meaning of the exclusion. This was the

construction given by Appellee in its processing of both the Lopez and Yoshida claims. (See Appellant's Op. Br. pp. 9-10.)

Thus, Gonzales was covered under the provisions of Appellee's insurance policy.

Conclusion.

The Court of Appeals should, therefore, enter judgment in favor of Appellants.

Respectfully submitted,

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Attorney for Appellants.

